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IN THE

Supreme Court of the United States.

No. 196. OCTOBER TERM, 1880.

GEORGE CROUCH,
Appellant,
vs.
WILLIAM ROEMER,
Respondent.

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APPELLANT'S BRIEF.

This cause comes here on appeal from the decree of the Circuit Court of the United States for the District of New Jersey, made on final hearing before Hon. J. T. NIXON, *J.*

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The only issue in the cause is the validity of the Letters Patent upon which the suit was brought; the infringement is admitted.

STATEMENT.

The Letters Patent are exceedingly simple, and, although the drawing is omitted from the record, it is substantially illustrated by the drawing of Porter's patent shown at page 216 of the record.

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The state of the art and the great step forward made by Crouch is told by Eustace, who came here in 1862 from Dublin, and commenced the manufacture of shawl straps, and was, so far as is known, the first man who ever made a specialty of that article.

He was the first also to introduce a strap with a leather bar connecting the ends of the handle and the straps; the shawl strap in use, in this country prior to that time, being simply a handle with loops and straps.

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His business grew until his sales extended to the principal cities of the country, including among his customers the largest houses.

In the full tide of success, in 1868, he finds a competitor in Crouch and Fitzgerald who introduced the rigid bar.

It took him by surprise and measurably superseded his goods.

Pages 25-7; fol. 75, *et seq.*

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The difficulties met with in the earlier styles of shawl strap lay in the fact that the act of lifting had a tendency to pull the straps towards the middle of the bundle, doubling up the handle and rendering the hold on the bundle with the cross straps insecure.

The rigid bar, as it is called, is a strip of rigid material provided with loops at either end to re-

ceive and retain in position the straps and supporting a suitable handle.

The testimony of the complainant Crouch is to the effect that he made this invention two or three years prior to the patent.

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He thinks his experiments commenced in 1865, and feels certain that they did early in 1866.

His first experiment was riveting a piece of iron under the handle, leaving the loops outside of the ends, but this was somewhat of a failure, for the reason that the loops, being unsupported, would drop down and in a measure produce the same results as the old flexible strap. He then extended the bar under the loops.

A large number instances of alleged prior use were set up, and while most of them are supported 8
by the testimony of single witnesses, a large amount of evidence has been aggregated which requires examination and scrutiny.

The fact that the article is of such a nature that any workman in a garret or cellar in secret could produce it, renders the patentee peculiarly liable to attack on this line of defence, and it is believed that analysis of the evidence will show that in this case the worthlessness, as a rule, of it will be demonstrated.

The Court below has not, in the opinion found 9
on page 14, stated upon which of the many of alleged instances of prior use were deemed sustained.

Preliminarily, it is objected that the evidence of Frank H. Watt Boltes M. Segee, and James Kite must be excluded from consideration. The two former are called to prove prior use, without notice by answer or otherwise and on the surrebuttal, and the latter is open to the same objection, and es-

pecially that his evidence is utterly incompetent in surrebuttal, in that he simply attempts to corroborate Rowen and does not reply to any new matter, or in fact any matter introduced by the complainant.

10 Under no rule of evidence can their depositions be admitted.

The same objections apply to other witnesses, more especially referred to under the heads of their special subject matter.

The incomplete deposition of F. Schmidt should not have been either filed or printed.

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GOODRUN AND WATSON.

For the defense there were introduced certain Letters Patent, granted to Thomas Goodrun (Exhibit 4), and William C. Watson (Exhibits 5 and 6), for book clamps.

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These are supported by an expert, Towle, whose efforts were directed to proof of identity with shawl straps, but who only succeeded in showing how the book clamps might be altered into shawl straps.

Inasmuch as all these devices consisted simply of a pair of clamps operated by cords and straps, whose only purpose and object was to tighten and hold the clamps, and which did not perform the office of binding a bundle, it is not deemed worthy of extended discussion.

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MILLER & WATSON.

Taking up the subject matter attempted to be sustained by the evidence of William C. Watson & Chas. N. Miller, we find in evidence three Exhibits, Nos. 12, 13 and 14, among many others which seem
16 to need discussion. Miller & Watson were partners.

Both of these witnesses seem to have received the impression from Roemer that their patents were involved here, and might become very valuable, and with inflated ideas came on the stand prepared to swear up to the necessary mark. Watson (whose habits of inebriety seem to have obscured his faculties) remained deluded to the end, but Miller saw the true state of things before he got through, and as far as possible rectified his loose statements on the direct.

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As to Exhibit 12, the only one resembling a shawl strap produced by these witnesses, Watson states (q. 4, page 152): "It was first made in 1867, a month or more after partnership was formed; (in q. 5,) that they might have made 25,000 or more, and again (in page 153, q. 14) that they sold near 100,000 of Exhibit 12 and Exhibit 2, with straps like Exhibit 12.

Strange to say, however, they did not make over ½ gross in 1867, did not wholesale them, and only sold them to unknown transient people (see page
18 154, q. 29 and 30).

Miller says in q. 14, page 156, that Exhibit 12, was made before the partnership, *some with straps and some with cords*, and in x-q. 22 and 23, page 157, that they were made before Exhibits 10 and 11, and also that they were ready for the market at the same time. In x-q. 24, page 157, that Exhibit 12, was not sold in as large quantities as the other kinds, and that he don't think it was to the extent of thousands.

In his corrections (page 200–202), he would not like to swear that Exhibit 12 had straps riveted on as shown, or that the handle fastened differently from Exhibits 10 and 11.

The only one of Exhibit 12, the sale of which he could recall, was in the case of a cigar peddler 19
(x-q. 25, 26, 27, page 157), and he doubts (page 201) whether it had *straps* or *cords* and thinks the *handle revolved* and it wound up on the handle. On his re-direct (q. 41, page 202), counsel asked him if by his correction he meant to say he did not remember having sold Exhibit 12 without a lower clamp and with cross straps and springs, and he settles this whole matter by stating he remembered but one case—that of the peddler—and that that had a lower cross bar like a book clamp.

A further point in his correction (pages 201–2) throws some light on this matter where he explains 20
the inquiries as to the price of straps to have for their purpose, to see if they could not sell their article as cheaply as a school boy could buy a simple strap. Certainly it cannot for a moment be supposed that Miller & Watson expected to furnish *two* leather straps with such a handle as in Exhibit 12, for the price of a single leather strap, but that they inquired the price, simply to see whether they could supply their book clamp with strings as cheap as a single leather strap which they had advertised to do.

To sum up all the evidence, the 100,000 of Ex- 21
hibit 12 sold, dwindled down to one, which turns out to be a pair of clamps.

It is evident that Exhibit 12 was never sold, both upon the testimony and the inherent facts, and in view of the extensive sale of Exhibit 12, as sworn to by Watson, a want of other corroboration of these unfortunate witnesses is significant.

As to Exs. 13 and 14, Watson says (q. 7, page

152): Exhibit 13 was made the last of 1865, and (q. 10, page 152) Exhibit 14, first cast from it in the first of 1867.

Again (x-q. 30, page 154), Exhibit 13 was made last of 1866, and (x-q. 33) Exhibit 14 first cast from
22 it in 1866, at Barnett's, Newark, and that Miller was with him.

That (q. 11, page 152) some of the castings were fitted up and sold for *old brass*.

Next (q. 14, page 153), did not fit up many because they did not sell. They were *too heavy*. Fitted up 50 or 100. That they gave away more than they sold. Customers preferred Exhibit 12, or Exhibit 2, silver plated, with straps like Exhibit 12, of which they sold 100,000.

23 Again (x-q. 36, page 154), after fitting them up, they gave it up *because the straps cost too much*.

Again (x-q. 37), he *don't know* whether they *sold any*, and (in x-q. 38) he doesn't know who he gave them to.

On his re-direct (q. 55, page 199), he sold bundle holders on principle of Exhibit 14, and called them BOOK CLAMPS, which they undoubtedly were, and were used to *carry books* or anything.

MILLER says,

24 In answer to q. 4, page 155, that he does not recognize Exhibit 14, but that Watson had a number similar to it cast at Newark, of *iron*, and in q. 5, that they were at once abandoned as too heavy and too brittle, and were never worked up and offered for sale (see also q. 11). He further says (q. 7), that he inquired the price of straps for Exhibit 14; and in answer to x-q. 31, page 157, that he does not remember making such inquiries; and, again (page 201–2), that the inquiries made

were with reference to Ex. 12, as there explained. In answer to q. 9 he says, he went to Barnett's with Watson, to get castings like Ex. 14, which he corrects (page 201-2), by saying it was for castings like Ex. 12. Also, on page 201, he says he *never saw Exs.* 13 *and* 14 *before he saw them here.*

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Oscar Barnett referred to by Miller and Watson, as having made the castings for them, was called for the complainant, and says;

In answer to q. 8, page 67, *et seq.* that he made castings of malleable thumb nuts for them in Nov., 1867, and Jan. and May, 1868, but having examined his books, does not think he made any castings for them in 1866; and, further, never made any *brass* castings for them. The fact is, he is not a brass founder at all.

In all this mass of contradictory evidence, where 26
lies the truth?

Watson got *brass* castings from Barnett, who didn't cast them; Miller tells us of iron castings which Watson sold for old brass.

Watson says they were fitted up; Miller says they were not. Watson says they were sold, and then that he does not know; and Miller says they were not.

Watson says the brass was too heavy, and Miller the iron was too brittle. 27

Both agree they were at once abandoned; and, finally, Watson sells them under the name of *book clamps*, and Miller *never saw* them.

Further comment is unnecessary.

THE HAMILTONS.

The next subject matter is involved in the testimony of the two Hamiltons, father and son. (Pages 157 to 161).

28 The elder Hamilton, who testifies he has been in the trunk business *twenty* years, was located, sixteen or seventeen years ago, at 2 Courtlandt street, N. Y., and while there a peddler asked him for a strap that would not pull up, and *then the idea suggested itself* of making it with a stiff bar across. Whereupon he makes a strap with bar of hoop-iron, handle, loops and straps. In answer to q. 8, he says he thinks he made but one for the peddler, or it may have been two; and in answer to x-q. 15, as to making them subsequent to his occupation of 2 Courtlandt street, he says: "*If any*, I made very few of them;" and then recollects this ped-
29 dler. He knows absolutely nothing about this peddler, and kept no books.

So far as appears, there is no trace or clue of this transaction, or of any other testified to by him, nor remembrance of it, save in his own memory.

He claims to have made a few others, and sold them at the store, while at 2 Courtlandt street, but his answer (x-q. 15) indicates strong doubts as to whether he made any afterwards, save for the peddler. His memory is peculiarly defective.

30 In the testimony of Leitch, called for complainant (on p. 109), will be found a table compiled from the N. Y. Directory, showing that in 1853 and 1854 he had no place of business, but lived at 521 Broome. In 1855–58 he was located corner Prince and Broadway; from 1859 to 1866 he was not in the Directory; and in 1866 he is located at his present place of business.

Mr. Hamilton is then recalled, and testifies that

he commenced business at 2 Courtlandt street, not sixteen or seventeen years ago, but in 1846 or 1847, thirty years ago, and remained there till 1849 or 1850.

A memory that will make a mistake of fourteen years in time, and yet at a distance of thirty 31
years recall an incident of a peddler coming into his store, and wanting a strap which would not pull up, and the details of its construction is peculiar indeed.

More than that, this same memory recalls the fact, after a lapse of twenty years, that that same peddler, ten years after the incident at 2 Courtlandt street, walked into his store, now corner Prince and Broadway, a mile and a half distant, and wanted another one of the same kind, and yet he knows nothing else about this peddler and did not keep books. 32

And yet more strange, that same memory fails to recall the fact that somewhere when his name does not appear in the directory, but between 1859 and 1866, he made another strap at his store, corner 19th street and Broadway. and the son of his father, a lad of twelve, tells all about it.

A inventor of a shawl strap with a rigid bar, 30 years ago, when shawl straps were uncommon, if indeed they were known, was certainly far ahead of the march of improvement, and so far from being proud, he frankly admits that Crouch and Fitzgerald were the first to introduce it into market (q. 23 33
& 26).

When he was recalled, he states that he thought he had refused his name to the directory canvassers. What his object was in refusing it for seven years as he must have done, does not appear, but it is somewhat remarkable, that a business man should pursue such a course in the city of New York.

Hamilton, the younger, testifies that when he was

a lad of twelve years, he was with his father at corner 19th street and Broadway, and a party came in the store to buy a shawl strap to carry heavy parcels (not to prevent its pulling up), and that not having one strong enough, *the idea suggested itself*, to use a piece of hoop iron to make the strap
34 stiff (q. 7).

It would seem that the idea which suggested itself fourteen years before would have remained, but that memory failing, the inventive faculty again came in play.

Tho strap was as large as Rumpp Exhibit (x-q. 31), and was not strong enough, and he is not clear as to whether it was made in his father's shop or whether it was of some one else's manufacture (x-q. 36).

His impression is that the strap was complete, and the iron riveted on to it.

35 His memory is not clear as to its color, although he thinks it was light colored, nor of the shape of the handle, although he thinks it was round like Exhibit Rumpp.

His memory is defective on almost every other point inquired about, and he and his father both deal in shawl straps infringing on the complainant's patent.

No reliance can be placed on such testimony, interested as it is in the result of this suit, for the reasons stated, and the fact that no opportunity exists for contradiction, that no books were kept, no parties buying the straps are known, and no employ-
36 ees recollected except a cousin, and even if they could be discovered, such extraordinary memories could hardly be expected.

No further rigid bar straps are sworn to by either of these parties, although nine years elapsed between the date of the one sworn to by the younger and the patent, and if the slightest credence is to be given to their testimony, the presumption is irresistible, that the knowledge of the strap or staps and their construction had been lost long before the invention of the plaintiff.

DANIEL RISSLER.

Another instance of alleged anticipation is attempted to be proved by Daniel Rissler, of Brooklyn (pages 216 to 219).

He swears that three or four weeks before Christ- 37
mas, 1861, he made a rigid bar shawl strap for a lady whose name and residence he has no knowledge of and does not appear to have ever had.

He does not appear to have any record of the transaction ; is not certain where he was carrying on the business when he made it, and his only means of fixing the year is given in his answer to x-q. 37, where he says, "Well, I always made out my bills for 1860, and after New Year, I found I had to put the 1 on instead of the 0."

This experience of his in changing the unit of the 38
years as they succeeded each other, is one which must have been repeated, and the reason given for locating the incident in 1861, would apply with equal force to every year since, including the change from 1870 to 1871.

But the witness could hardly have meant that this change from 1860 to 1861, would fasten an incident on his memory which occurred on the eve of his changing from 1861 to 1862, for that would be absurd.

And yet, although his answer to x-q. 37 would indicate that he made this strap Christmas, 1860, he 39
swears in R-D q. 38, that it was made Nov. or Dec., 1861, as he also did in answer to q. 4.

His answer to question 6, following as it did this recital of his story is significant. Being asked "when first did you see a stiff bar shawl strap " he says, " I seen them in Wilson's store, 172, William street, N. Y., *that was after they were patented.*

The question being repeated he tries to excuse his forgetfulness of his own strap by saying that it

was not a *strap* when it was *sent* to him, a piece of logic as unsatisfactory as his subsequent statement (x-q. 29) that the lady *brought* it to him, instead of *sending* it.

His testimony as to Fitzgerald coupled with his subsequent correction throw some light on the reliability of his memory.

It is submitted that this witness uncorroborated in any particular, vague and uncertain as to time, and with no sufficient reason for fixing the year, *himself an infringer*, and dealing in the defendant's goods, is utterly unworthy of credence.

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PATRICK J. BUCKLEY.

Another instance of alleged anticipation is furnished by the evidence of Patrick J. Buckley (pages 211 to 216), another infringer, whose personal interests in the suit may well stimulate an extraordinary memory.

In the employ of Knorr, Nece & Co., of Philadelphia, from 1852 to 1860, as cutter, &c., between 1857 and 1860, he cut out and assisted in making shawl straps with rigid bars at least two seasons.

He knows of no one who knew of this fact beside himself, except the bookkeeper Hipple, who is dead.

Of all the associates in the establishment he could name, who would be likely to know about this matter, three are dead, one *non est inventus*, and the remaining one—a result probably anticipated, as as on (re-direct q. 25, page 213), Buckley locates him in a different room—is a witness herein for the complainant.

Buckley describes the straps (x-q. 38, *et seq.*) as made there, and his description is so extraordinary that it has been deemed best to illustrate his testimony by a reproduction which will be submitted to the Court. It is confidently believed that their like has never been seen before and is not likely to be seen again.

In answer to q. 5 as to the kinds made, he describes, as first made, the common shawl strap with leather bar.

(While not important, it is not likely that this statement even is true. Eustace, complainant's witness (pp. 35, 38) was undoubtedly the first to make the leather cross-bar in this country.)

Some of *these* were *book straps* with *wooden bar uncovered*, the *straps* fastened by a *screw*.

Again, *some of these*, in the latter part, were made of *light* leather stiffened by a *hoop* or *sheet-iron bar*.

Eustace, Miller & Watson and Crouch, are all bowled over in a breath by this witness.

It is true, this genius, in x-q. 41, uses *heavy* leather with the *iron* bar instead of *light*, and *light* leather with the *wooden* bar instead of none; that (x-q. 46) he is uncertain as to whether he used iron or wood bars first, but thinks *iron;* instead of (q. 5) using iron last, that (q. 28, 30) he made Ex-
46 hibit 26 *then* and *now*, although (q. 29) he appears to be uncertain whether the loops were *over* the *bar* or not. But of one thing he is certain, his bars, leather, wood or iron, were all *stiff*.

His first bar (x-q. 43) was *stiff* leather, and considering the then state of the art, according to Eustace, that advance must have been very satisfactory and the frequent changes and rapid invention testified to by Buckley, is difficult to explain, especially when he attributes his defective memory, toward the close of his cross-examination (x-q. 45) to the fact that "they were made between such *long intervals*" and "were of such *trifling im-*
47 *portance.*"

The witness nowhere undertakes to state the numbers made.

We were able to produce his only known associate, Thomas Jones (pp. 24-25, complainant's proofs), who appears to have been Buckley's teacher, and who was employed as cutter and foreman, and who was in a position to know what was being made in this establishment, and who has no knowledge of the manufacture of shawl straps having been made there, is confident they were not, and swears he first *saw a shawl strap* in 1869 or 1870.

48 He further swears that Mr. Nece was in charge of the shop, and that Hipple was a clerk in the store, and was an unlikely person to give out or direct work in the shop.

The cross examination of this witness developed the merest possibility that these straps might have been made without his knowing it.

On the surrebuttal an attempt was made to corroborate Buckley by men who professed to have been employed at Knorr, Nece & Co.'s, viz.: Gamble (p. 154), and Mahaffey (158).

These witnesses were not cross-examined, on the ground that the testimony was incompetent on surrebuttal, and also that they were not named in the answer as having a prior knowledge of complainant's invention.

It is submitted that if their testimony goes to the main fact at all, it is utterly inadmisible as surre- 49
buttal.

It is further submitted that neither of them really corroborate Buckley as to the manufacture of *rigid bar* straps.

In addition to the points already made on this subject, it is very significant that no evidence of any *sale or use* of these straps. if made, was offered.

The firm of Knorr, Nece & Co. is believed to have been a highly respectable one, and its members and their whereabouts well known to the defendant and to Buckley, who had a strong interest in de- 50
feating complainant's patent, and yet neither they nor their clerks are produced to prove use or sale.

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THE PORTERS.

Another alleged case of anticipation is that attempted to be proved by T. W. and H. K. Porter and C. L. Marston.

52 Perhaps of all the strange proofs offered by the defendant in this case, this presents the most peculiar features.

A patent for the identical invention secured to the complainant was applied for, pending the complainant's application to the Patent Office, and was granted to them a few weeks after the patent in suit was issued.

It is impossible to do justice to the testimony of T. W. Porter in this summary.

53 Briefly stated, Porter, who was a colonel in the army, commanding in the fall of 1864 under Sheridan, a *regiment* or *brigade*,—*he is not certain which* (?)—was obliged to carry his blankets in a blanket-strap which drew the binding straps together and pinched his fingers.

In his tent and in secret, he experimented to overcome this difficulty, which he succeeded in doing in divers ways, notably, by tying the straps over the ends of his blankets and inserting a wooden spreader, the precise character of which does not appear.

54 Having a regiment or brigade on his hands (he don't recollect which) his memory naturally fails him as to the history of his experiments, but at any rate the idea seemed to him so valuable that fearing it might be stolen from him, he was induced to forego its use and submit to the consequent suffering entailed by such a course, although his fears did not prevent him from communicating the discovery to a few of his line officers, and perhaps to some friends at home.

The care of the regiment or brigade (he don't know which) may have affected his memory in this regard too, as complainant's witness, Bremer (p. 84, fol. 130), testifies that in 1874 Porter told him he had made his shawl straps in the army for his brother officers, who thought it a good thing.

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At this point the query arises, that inasmuch as Col. Porter was a mounted officer and must have been provided with a saddle with the necessary arrangements for fastening his blankets and overcoat to it, what possible occasion there could be for carrying his blankets in his hands, which were fully occupied with a regiment or brigade (he don't know which) a bridle and an occasional flourish of his sword.

However, he returns in 1865 and *commences to look around* for a man to take an interest in his invention, and *furnish the money to obtain a patent*, 56
as he had not the means. Strangely enough he failed to find such a man, but he made some—*spreaders*. In 1865 or 1866, he became associated with C. L. Marston, in connection with other patented inventions, upon whom he urged the shawl strap. He also made some straps, one of which Marston had and used. Subsequently Marston furnished the money, and the patent was obtained. An earlier application was not made (q. 10, p. 226) because of his impecuniosity.

Marston and himself (q. 12, p. 226) were the only persons using his invention up to the time of his 57
application : (see Bremer, complainant's proofs, p. 77).

The cross-examination of this witness developed, (pp. 226 to 230).

1st. He was a lawyer, patent solicitor and inventor, both before and after his army experience.

2d. He was at Washington soliciting patents at various times between 1865 and 1874, but whether he was there in 1868 *he was unable to state*, but may have been (x-q. 26, p. 227).

He did not stop at hotels there, at any time, as
58 he found boarding houses just as comfortable and less expensive, and is unable to state with *precision* any boarding house he stopped at, although he was usually there some weeks at a time. (x-q. 28, p. 227.)

3d. His impecuniosity continued for three years and over, notwithstanding the engrossing and varied business enterprises and professions he was engaged in, and the large number of inventions he made and patented—a bushel of them. (See Bremer, page 84, fol. 130.)

59 4th. Within two weeks after the granting of his patent, he learns for the first time of the complainant's patent, and with a commendable promptitude the same day addresses a letter to Messrs. Crouch & Fitzgerald (page 113, the philosophy of which under the circumstances marks the remarkable qualities of this remarkable veteran.

Chas. L. Marston is next called to corroborate Porter, and does to the extent of *thinking* he had a letter from him, while in the army, referring to a strap, which letter he did not produce and evidently had not looked for. (q. 6, page 230.)

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Subsequent to Porter's return, he conversed about it and *made some straps* (q. 9), date, first of 1866, he thinks, and is as positive as he can be without dates that he could swear by (x-q. 30, page 232.) He does not know how many were made, but witness had one which he has since used.

In answer to q. 22, a guarded question, he thinks Porter did not have means to take out a patent before he (Marston) HAD AGREED to furnish it.

But in any event Porter's laches is settled by Marston, who swears (q. 20) that he thinks *it was over a year* after he, witness, agreed to furnish the money that he, Porter, *procured the models and sent them on.*

Henry K. Porter, a son of T. W. Porter, is also 61
sworn, and states that he is a co-inventor with his father, supplying a rigid handle, which however the Patent Office rejected (pages 233-234).

He swears that his father told him about his invention after his return, and tells about making some sticks; that his father claimed to lack funds, but has no positive knowledge of the fact (q. 7); that T. W. Porter made some straps, which he can only guess at, but without guessing locates it as being within a year after June, 1866 (q. 10).

In q. 13 he effectually settles matters, by saying 62
that he never owned one. That only two were made to his knowledge, one of which went to the Patent Office, and Marston had the other.

To sum up this batch of testimony, the story of the invention is exceedingly improbable.

Officers and men in the army did not carry blankets, &c., in the hand, for the load would soon become intolerable with or without the most improved straps, for their weight and size would at once compel a man on foot to transfer the load in some way to his shoulders.

A mounted man could not possibly have any occa-
sion for a blanket strap, for their saddles are es- 63
pecially provided with means to compactly carry them.

But whether Porter conceived the idea or not, he did not reduce it to practical form or use until he applied for a patent after the complainant's invention was on the market

The son and co-inventor swears, to his knowledge, but two were made, one for the Patent Office, and

the other for Marston, he never having had one (q. 13, p. 231); and Marston swears that it was over a year after he told Porter he would furnish the money to patent it (q. 20, p. 232), before Porter procured the models and sent them on.

64 The conclusion is irresistible that even assuming that Porter's brain did become luminous with this grand conception, in 1864, its evolution was so slow, concretion did not set in, until after the complainant had thrown it on the market.

That there is a lively interest in these witnesses, as to the result of this suit, cannot be denied, and in view of the fact that the defeat of Crouch's patent would leave theirs exceedingly valuable, especially if defeated by their testimony, they should be only credited after the the closest scrutiny and analysis.

65 This fact, coupled with the further facts that Porter *pere* was a patent solicitor, that his answers are unsatisfactory as to his whereabouts in Washington, where he spent much time, and (q. 26) especially as to whether he was in Washington in 1868, or not.

That, contrary to known usage, his application having reached the office some weeks after the complainant had been before the office, no interference was declared, and both patents issued within a few weeks of each other.

That the complainant's patent should have been reissued in 1871, and still no interference be declared or notice taken of it.

66 That Porter should, immediately after his patent was issued, so opportunely discover the complainant's goods, and forthwith find the Patent Office reports containing the claims of complainant's patent, and that too when the Patent Office reports for 1868 could not by any possibility have then (January 5, 1869) been published.

And that he should display such philosophy as that disclosed in his letter Exhibit S, ought to condemn this testimony as utterly unreliable.

FRANZ MEINBERG.

Another instance of alleged anticipation rests solely on the testimony of one Franz Meinberg (p. 247, *et seq*).

On the 26th day of August, 1875, Meinberg, having patented an alleged improved shawl strap, 67
walks into the office of the complainant, sees his son, A. A. Crouch, with whom he had a conversation in which Meinberg stated his desire to procure from the complainant permission to use his patented loop.

The interview was an unpleasant one, and, as the witness puts it, Meinberg was threatening and angry.

(See A. A. Crouch, pp. 69 and 70.)

Four days after the 30th of August, 1875, the defendants' counsel gives notice that on the 28th 68
inst., Meinberg was ascertained to have knowledge of prior use, &c., and asked consent to an amendment of the answer to include his name, which was given.

Meinberg, in brief, states that he was engaged in the business of fancy saddlery from 1853 to 1868; that he made shawl straps between 1864 and 1868, at corner 11th street and 4th avenue, and at 99 4th avenue, New York; that he made shawl straps like Exhibits 1, 2 and 3, while at those places.

Exhibit 1 has not rigid bar at all. Exhibit 2 has a light metal binding which does not constitute a rigid bar, a view shared by the Patent Office when 69
he made his application.

See file wrapper, Meinberg's application, Exhibit U, in MSS., where the examiner replies to a statement in the specification, that the binding stiffened the cross piece, as follows:

"Agent is certainly in error in stating that the metal binding forms a 'powerful stiffener.' But little effort is required to bend the model furnished, and it remains in the position in which it is bent."

Exhibit 2 is a metal bar with turned edges and substantially comes within the term rigid bar.

An analysis of the testimony of this witness discloses the fact that he rarely makes two statements of a given subject alike.

For instance:

70

1. He left his employer and went into business at corner 11th street and 4th avenue, in 1864 (q. 4, page 247), and remained a couple of months, and on cross-examination he says it was before May, 1863, and remained during that summer (q. 58, 59, 60, page 252).

2. That he moved to 99 4th avenue, in 1864, (q. 4,) in August, 1863 (q. 6), and 5 or 6 weeks after June, 1864 (q. 85, 86 and 87).

71

3. He made Exhibit 1 in November, 1865, to put in show-case (q. 7); and again it was put in the case five or six weeks after June, 1864 (q. 84, 85, 86 and 87).

He made but one (q. 17); and again made *some* and sold them (q. 101, 102 and 106).

4. He made Exhibit 2 in 1867 (q. 7), in 1868 (q. 9), in 1867 again (q. 10), is not sure was it 1866 or 1867 (q. 92), beginning or end of 1866 (q. 93), and one-half or three-quarters of a year after he bought a bending ma-

72

chine which he locates also at different times in the years 1865 and 1866. It is the last kind he made and he puts it in 1868 (q. 9), and he made very few of them, one of which was made at a cost of $15 or $16, for a lady who wanted it very stiff, regardless of cost, in beginning or end of 1866, and two more, he says, were made for George Nichols (q. 94); when, is not disclosed; and yet, in q. 138, 139 and 140, he

made not more than four or five and sold a few of them to people he don't know, and gave a few of them away to a young man for services, whose name and whereabouts are unknown, and has one left.

5. He made Exhibit 3 in November, 1865 (q. 7), put it in his show case in 1864 (q. 90), and again in middle of 1863 (q. 131), and again December, 1863 (q. 32 and 33). He knows he made *at least* three or four dozen in 1866, before the holidays (q. 15), and not more than two dozen in 1865, and does not know how many he made in any year (q. 130), but is sure he made five dozen in all 73

He is unable to tell to whom any of them were sold, the only available information on the subject vouchsafed (q. 133), is the location of a house of prostitution where he sold five. 74

6. He bought a show-case while at 99 Fourth avenue, in 1864 (q. 4), and again corner Eleventh street and Fourth avenue (q. 158), and also in the beginning of 1863.

7. He bought a bending machine three years after middle of 1863, or December, 1863 (q. 33); guesses it was 1865 or 1866 (q. 35), and middle or end of 1865 (q. 119 and 120). 75

He had no help and he is not corroborated by any one who either saw, bought or used them.

John P. Hays, of Harmer, Hays & Co. (p. 19 *et seq.*), strongly impeaches Meinberg. He was frequently at Meinberg's places on Fourth avenue; was a large customer, and never saw or heard of any shawl straps there, although he would have been very likely to have seen them if there.

At attempt has been made to help out this chaos of times on all essential facts by proving that his

wife died in March, 1867, but it simply increases the confusion and uncertainty of his story.

On surrebuttal an attempt was made to corroborate Meinberg by Henry Berger (pp. 289 and 290), under objection, which not only was incompetent and improper, but failed completely.

76 In addition, Meinberg is seriously impeached by two employers, Henry Korn (p. 39), Emma Bartlett (p. 31), and a customer, Mr. Hays, of Harmer, Hays & Co. (p. 19).

Korn says (q. 4): Meinberg's character is rather bad than good (q. 5); that he would not believe his word or give him much credit (q. 9); I would not trust him, and that he has heard from others unfavorable things.

Emma Bartlett (p. 5) swears very strongly against his character, and that he admitted that he was a liar and a thief, and didn't care (q. 8 and 56
77 *et als*).

Her feeling in reference to the witness seemed to have been intensified by her belief of his guilt of theft and arson, and a dispute with him over the right to an invention, which, in view of the fact that he employed time, material and machinery belonging to her, she thought she was entitled to.

It is significant, in this connection, that he was experimenting three years ago in her employ, upon an invention which, if his story be true, was made on the bending machine he had in 1865, or there-
78 abouts.

John P. Hays (q 29 and 34) would not believe him under oath, because from his language it appeared he had no respect for God, man, woman or anything else.

An attempt to sustain his character has been made by the evidence of HENRY BERGER (p. 289), Frederick Hamm and Emanuel Perls (p. 290), and Wm. Hanlon (p. 291).

BERGER (q. 5) swears that Meinberg is a member of his lodge of Odd Fellows, and has been treasurer, and "well, as much to my knowledge it is good, I never heard anything contrary or against him." It does not appear how lately he has been associated with him.

79

HAMM does not appear to have had any opportunities to know Meinberg or his character, and is guarded in his reply.

PERL'S knowledge of Meinberg is confined to his relations to the Hildise Bund, a German relief association. and does not pretend to have any knowledge of the man's character, outside of that organization.

HANLON knew Meinberg *sixteen years ago*, as *Aleck* Meinberg in Trainor's shop, and his knowledge is, so far as appears, confined to that time; 80
he never heard his character discussed.

It is submitted that this testimony is utterly valueless, as to his character.

To sum up, Meinberg, strongly interested in defeating a patent, which stands in his way, after an angry interview when applying for leave to make shawl straps, without loss of time, offers his valuable services to the defendant.

He tells a story which lacks every element of truth, is uncorroborated in any particular as to the 81
main facts, is utterly unreliable as to time, when time becomes very material, is seriously impeached by his cross-examination, and witnesses as to character, and by his patent applied for in 1875, for a thing which he now swears he made and sold ten years ago, and by Hays, who was a frequent visitor at his places, and neither saw or heard of shawl straps.

HATCH & EASTER.

The next instance of alleged anticipation is that attempted to be proved by Seth H. Hatch and Geo. A. Easter.

It seems that Easter was a son of Easter, of the
82 firm of Easter & Winship, trunk makers of Boston, and that both of these witnesses were in the employ of that firm.

As appears by the testimony of Isidor Bremer, he, in 1874, being then engaged largely in the manufacture of rigid bar shawl straps, was threatened with suit by the complainant, and had already been called on by R. H. Macy, of New York, a customer of his, to defend him in a suit brought in New York.

He therefore made an effort to prepare a defence,
83 in which he was encouraged and assisted principally by Easter & Winship (Bremer, p. 96, q. 308–9–10–11), who, from their own establishment, produced these two witnesses, who at once made the affidavits, Exhibits M (p. 110), O (p. 111), P (p. 112), V (p. 109), to be used by Bremer.

Easter & Winship had dealt in infringing straps, and were unfriendly towards the complainant (complainant's proofs, p. 96, q. 310, p. 97, q. 321–2–3, and Exhibit H, p. 98).

Bremer went on collecting evidence, until he
84 found that Easter & Winship were using him as a cat's paw (p. 88, q. 200, p. 95, q. 297), when becoming satisfied that he could not succeed, he made a business arrangement with the complainant to take charge of their shawl strap department, which still subsists.

Easter & Winship, as soon as Bremer had withdrawn, hastened to render a statement of straps on

hand Exhibit H, p. 98, with a viewto the payment of royalty, which Bremer never collected for the reason that it did not cover their previous transactions, "which they gave him to understand were in books they didn't have, and nobody could make them produce" (page 98, q. 333–4), although they subsequently asked him about the matter (p. 98, q. 331). 85

This conduct, considering the fact that the proofs to sustain them were within their own establishment, would be strange enough, were it not for the peculiar character of the testimony as developed in this case.

The chief witness Hatch has told his story several times, with the result which might be anticipated from the surroundings. As first told, in his affidavit July 21, 1874, Exhibit V (p. 114), in the fall of 1861, while a saddler in the army at Baltimore, 86 he took two common straps and the front piece of a bridle, run the strap through the loops, nailed a piece of wood to it, and then took another bridle front and looping it on the first, nailed it on for a handle.

This incident, as related in his next affidavit, October 17, 1874 (Exhibit, O, p. 111), is that in 1862 he made one shawl strap, having a wooden cross bar in combination with a leather handle, the ends of which were bent over to form a loop for the strap to pass through, which bar was extended under the loops of the handle, so that the straps 87 would rest on the top of the bar.

Nothing here about bridle fronts with loops already in them, but a strap is made with a wooden bar and a leather handle, *bent* over to form a loop.

The witness attempts to explain this by saying that the officer must have made a mistake by calling the whole affair, except the bar, a handle, but the officer was Winslow Warren, U. S. Commis-

sioner, who would be little likely to make such a mistake as to characterize the whole thing a handle and make the witness swear that he bent the ends over to form loops, when the witness had been describing a crude affair made out of bridle fronts with loops already on them.

88 His next recital (p. 238, q. 7) omits the second bridle front and the looping of it over, and nailing or riveting of it to the first bridle front. Here he simply rivets *a* handle through *the front* and wood.

His next recital (p. 239, x-q. 25) differs only from the last in that it describes the handle as a piece of leather.

The next incident is the making of two straps at Franklin, La., two years after, of leather and steel.
89 The first recital in Ex. V, p. 114 is two pieces of steel forged out of an old sabre, were covered with leather the whole length of the iron, leaving two loops, one at each end, for the straps and handle riveted on through holes punched at forging.

The next recital in Exhibit Q, p. 111, is to shawl straps with iron cross-bar to which a *leather handle, forming loops* on each end for the straps to pass through, was riveted.

Nothing said about covering the iron, but the handle was riveted on.

90 The same attempt is made to explain by attributing mistake to the officer.

But did this witness read this affidavit? Mr. Hatch is not an ignorant man. Such a bold and plain mistake might, in a long affidavit, escape him once, but could it twice?

The deposition was taken to be used in this case on the motion for injunction, before an officer accustomed to the work, and conscious of the im-

portance, and the witness was taken before him by whom ? Evidently by some one interested in the matter.

And now he comes on the stand. (q. 9, page 238.) The sabre was steel, was taken from the rebels, was covered with black bridle leather, a strap on each end, and a handle on top riveted on. 91

This is more noticeable for what it does not say. On cross-examination (q. 28) they were made from not *a* sabre taken from the rebels, but from "sabres or swords," covered with black leather, loop in each end, the steel running the full length inside the leather, and the straps on top of the steel above it.

Now we have it. Hatch has found out what was needed from him, and he meets the emergency fully.

Now let us see what this man wants such a thing for. 92

When he made his first one he was in camp at Baltimore. He was a mounted man, had a saddle with three regulation straps to hold his coat and blankets behind it. He says (q. 7) that he found they were unhandy to take off without straps to *hold them together while they were off*.

Why ? If he took them off, it was to use them, not to *carry* them, and if not to carry them, why did he feel the need for more than a plain strap ?

His statement is absurd. 93

But he gives us another reason.

He wanted to use it to carry his blankets in when he went on *inspection* (q. 74).

A lie on its face. He was in a battery, where regulation and discipline is excessively stringent, especially on *inspection*.

Had any soldier made his appearance on inspec-

tion carrying his blankets in a strap, and especially such an one as he describes, he would have been sent out of the ranks and punished.

In his earliest deposition Ex. V, 114, he describes a strap with iron bar made for his daughter
94 and put in a church fair at Somerville for sale.

This was of the utmost importance, if true. Seen, as it must have been, by many people, it could have been thoroughly substantiated as to time and character.

But strange to say, he never repeats the story in his deposition, Ex. O, p. 111, or in his testimony, contenting himself to the merest reference. Instead of which, he tells a story on the stand not mentioned in his depositions, which, briefly stated, is as follows:

95

Exhibit 27 he made at Somerville, while in the employ of one Horton, a trunkmaker, in the fall of 1865, as a Christmas present to his daughter; that she had it a year or two or more, and then while visiting in Maine, gave it to her Cousin Carrie Elmes.

That he himself was there in August, 1875, and saw the strap, and while there, was sent for by Easter & Winslip, and on his return found that he had been sent for on the shawl strap business, telegraphed for this strap and brought it to New
96 York. (Rd., q. 80, page 245.)

This Exhibit is a good piece of work, the bar running out the full length, and singularly enough has a handle precisely similar to those on the No. 7 strap introduced by Crouch and Fitzgerald.

This strap, No. 7, was first made early in 1869, and was sold in Boston as early as April, and to Easter & Winslip, August 9th, 1869. (Leitch, page 108, q. 3-6.)

Supreme Court,

OF THE UNITED STATES.

GEORGE CROUCH,

Appellant,

vs.

WILLIAM ROEMER,

Respondent.

No. 196.

BRIEF FOR APPELLANT.

E. B. BARNUM,

Of Counsel for Appellant.

New-York:

BENJ. H. TYRREL, LAW PRINTER, 74 MAIDEN LANE.

1881.

Exhibit 27 further does not look like a single job made with ordinary tools in a man's own house, as testified to by Hatch, but as though it were one of many, systematically planned and made, and in this respect contrasts suggestively with Exhibit 23.

97

In following this matter, complainant found that Carrie Elmes was probably in a dying condition, and a personal friend of hers, one Emma F. Dodge, was inquired of, and stated that the strap was sent to Carrie Elmes by her uncle, Hatch, in or about August, 1869; that it was new at that time, and that Hatch's daughter had another just like it. (Testimony Annie J. Baker, pp. 121 to 128 and Exhibit Z, p. 123.

Notice was at once given of the intention to take her testimony, and Messrs. Fitzgerald and Parsons went on to Wiscasset, Maine, and saw Miss Dodge, 98
who repeated her previous statements.

Mr. Hatch, however, put in an appearance shortly thereafter, interviewed Miss Dodge, and her testimony shortly after showed the influences of his visit, but enough was elicited from a very reluctant witness to show that her statements were substantially true. (Page 119, q. 69.)

To rebut Miss Dodge, Hatch's daughter, Mrs. Blair was called, and her testimony shuts the door to the possibility of Exhibit 27 having been made in 1865.

99

All she is positive about is that it was made before 1869, (defendant's proofs, p. 299-300, q. 3 and 5), and that she had used it *but once*, and that, if at all, probably on the way to see her cousin.

She thinks (q 5) she had the strap the second year after her father's return, and (q. 6) that it was made before the year 1869. "That is all I can say about it."

It is evident that she has no reliable recollection of it prior to 1869.

A year later, or in the fall of 1866, Hatch puts the making of Exhibit 23, a strap wherein the stiff bar does not extend under and support the loops;
100 and in this an attempt is made to corroborate him by Geo. A. Easter, who claims to have assisted him.

Hatch says, in Exhibit V, page 114, that in fall of 1866 he stitched the handle and buckles on the strap and Easter stitched the frame; in Exhibit O, page 111, simply that he assisted in making it.

In his testimony (x-q. 42, page 241) he swears *he never stitched the buckles on.*

He can give no reason for fixing the time in the fall of 1866. (Q. 51-2, page 241.)

Geo. A. Easter, in Exhibit M, p. 110, swears that
101 it was made in fall of 1866, that Hatch cut it out and stitched the handles and buckles, and he stitched the bar.

He carried it home to his wife who used it about three or four years, and then she gave it away.

In his evidence (page 234, *et seq.*) he states that he never saw any shawl straps in market up to this time, fall of 1866, (q. 8.)

That (q. 31) Exhibit 23 was *used a short time* after it was made in his family, when his wife gave it to a young lady; and (q. 32) it might have been
102 *one month*, *six months* or *a year* after it was made before it was so given away.

That about a year ago he followed it up and got it back and gave it to his father, who gave it to Roemer.

Hatch and Easter both swear in Exhibits V, page 114, and M, page 111, that a *few months* after Exhibit 23 was made, Hatch made another for Easter, which he now has.

Easter (x-q. 37) says, it might have been a *year or so* after.

Easter gives no reasons for fixing on the fall of 1866, as the date of Exhibit 23. (x-q. 29–40.)

Easter's memory, as to almost every other matter, is very defective, and his outrageous denunciations of the complainant and his firm during his examination, evidenced a hatred difficult to understand. 103

Hatch further testifies that he made others before Exhibit 23, but none are specifically described, and (q. 11) he does not know how many, except that he made several, nor what became of them; "some I gave away, some I sold," *made for friends* who paid me for them. A man who made several of these things, both as gifts and for sale to *friends*, certainly ought to be able to recollect some of them.

To sum up, his army tales are plainly romances, his Exhibit 27 came into existence after Crouch had made his invention, and neither Hatch or Easter have any good reason for putting Exhibit 104
23 in the fall of 1866, any more than 1867, 1868 or 1869.

There is another point that throws great doubt upon this evidence.

Hatch, before he gets through declares that all his straps made prior to Exhibit 23, had the rigid bar extend out under the loops. The necessity of that feature became apparent as the matter proceeded.

The advantages of that plan are evident, as the complainant shows he did not consider his invention complete until the bar did so extend.

And yet Hatch takes the back track and produces 105
for his foreman a strap so inferior to all that he had theretofore done, as practically to be less desirable than a good stiff leather bar, a short light spring running simply between the ends of the handle and leaving the loops to hang down.

I shall have occasion to refer more fully to the subject of retrogressive invention farther on, and so dismiss this subject matter with the remark that this one feature alone ought to discredit this testimony.

JOHN ROWEN.

The next subject of examination is John Rowen, who stands alone and uncorroborated upon a mass of fiction.

An attempt to bolster him was made by the in-
106 troduction on surrebuttal by one James Kite, who was not cross examined for the reason that his testimony was incompetent, there being nothing for the defense to rebut by Kite, save character, and also for the reason that he was excluded by the rule requiring notice of his prior knowledge.

Rowen commences by stating that he is in business for himself at 932 E Lehigh Ave., Phil. Contradicted by Kennelly who testifies Rowen borrowed money of him and said he was doing nothing (page 49, q. 16).

Rowen's story in brief is, that he made Exhibit Rowen, latter part of September or first part of
107 October, 1864 (page 167, x-q. 83), for his wife to be, suggested to him by having seen one in possession of a fellow workman, who he has not seen since 1862 (x-q. 59). That within two or three months thereafter he commenced to make them for sale. He produces two memorandum account books, and his story thenceforward is dependent on these books, without which he seems to have no recollection of the transactions mentioned (x-q. 158, page 171). Nor could he recollect to whom he sold in 1864 and 1865, without seeing the books (x-q. 76).

108 These two books present some peculiar features.

First.—No evidence of their truthful character is given, no pretence that the entries were made at the time, and in fact no foundation is laid for their introduction, which is objected to.

Second.—They are badly and suspiciously mutilated.

Third.—Covering three years in time, they are written throughout with the same handwriting, in

ink of the same color and consistency throughout, and present strong internal evidence of having been written at one time.

Fourth.—They are carelessly kept and are rarely particular in description of goods, except in the case of bundle holders. 109

Fifth.—Entries of goods sold, moneys received and paid, and consignments to auction are found under dates of February 1 and November 22, 1863, February 21, October 9, 16 and 23, 1864, in Exhibit 15, and October 1, 1865, Ex. 16, all of which dates fall on Sunday.

Sixth.—They have been miraculously preserved for over twelve years, and through at least twelve removals.

Seventh.—Kept by a workman, and played with and badly torn by children, they are singularly 110 clean, and the mutilation is of whole pages only.

As before stated, he made Exhibit Rowen the latter part of September or first part of October, 1864, and commenced their manufacture about two months afterwards, but is not positive without seeing his book. His attention is called to item Frazier, October 20th, 1864 (x-q. 80, page 167), and then states that to be the first he made and sold. Strangely enough, however, there appears an item of October 5th, 1864, of a sale to Hamil of "1 doz. *bundle straps*, PLAIN, WITHOUT BRACE!"

111

He had just made, or was about to make, Exhibit Rowen, which had the stiff bar or brace, and he first made and sold them, *with brace*, on October 20th, 1864, and yet his first item is as above stated.

Comment is unnecessary.

Taking up all his items of sales in 1864 and 1865, all of the parties are *non est*, dead, fugitive from justice and of unknown whereabouts.

He denominated these straps, bundle holders,

and did not know until 1867 that they were known as shawl straps (x-q. 87, 88), although he saw these goods in various shops, five or more, in Philadelphia in 1864 and 1865, and had his attention called to them by shopkeepers when he was trying to sell his (x q. 162 to 175).

112

Again, he never heard of Crouch's shawl straps, nor of Crouch & Fitzgerald, nor heard of them until within five month (x-q. 215–7), notwithstanding rigid bar shawl straps were distributed in Philadelphia from 1868 to 1873, while he was selling his goods (x-q. 223, 229).

Although in the habit of sending goods to auctioneers, he cannot name any to whom he so sent (x-q. 106, 108).

In 1864 and 1865, and again from 1868 to 1872 in-
113 clusive, he never sold or offered to sell shawl straps to trunk houses, although constantly offering and selling other goods, satchels, school bags, baggage straps and carpet bags to them (x-q. 176 to 182, and x-q. 213–214).

His reason for not doing so is, that he supposed that they manufactured them themselves (x-q. 176), although he does not recollect seeing them have them (x-q. 184, 185), and although he couldn't say that they did not manufacture the goods he did offer (x-q. 183), and must have known they did.

114 In 1873 (x-q. 213) he did offer shawl straps to the trunk houses, and his reason then was that he made large quantities then, and could not find a sale for them in notion houses, &c.

His answers to questions as to numbers made by him from 1868 to 1874 (x-q. 188 to 207), are indicative of this fellow's entire disregard of truth.

The witness Kennelly, who worked for Rowen in 1869 and 1870, swears that he made no shawl straps and kept no books that he knows of.

It is impossible, within the limits of any brief, to follow this witness through all his bungling falsehoods.

With such testimony it is absolutely certain his character must be bad. George B. Bains, William H. Gosnell and James J. Morrison, all reputable 115
business men in Philadelphia, paint him in black colors.

BAINS (pp. 41 to 48, and 58 to 51) details what he knows and what he has heard, including a transaction wherein Rowen left certain leather with Bains to be sold, which Bains delivered to a stranger who claimed it, solely on the ground that from Rowen's character he believed the strange claimant, and further that Rowen never called him to account. The presence of Rowen on the adjourned day disturbed his equanimity in performing a disagreeable duty. 116

GOSNELL shows Rowen to be a swindler and liar, and discloses the fact that he was a partner of Freeman and had relations with the fugitive Hamil.

MORRISON would not believe Rowen under oath, and a failure to cross-examine prevented further developments of his dishonesty.

To rebut this testimony, is produced :

JAMES MCCABE, who has known Rowen six or 117
seven years, but who say nothing for or against him, and swears to delivery of a part of certain samples left by Rowen, his testimony being intended to contradict Bains, which, however, he fails to do.

DANIEL F. BISPHAM, who never heard Rowen's character discussed.

CHARLES B. TURNER, who knows nothing against Rowen.

ADOLPHUS Y. ANDREWS, who heard Rowen's character discussed by Rumpp and his clerk Miller, the night before.

WILLIAM H. DAVIS, who heard Rowen's character discussed the same day by Turner and Miller.

118

THEODORE E. FREEMAN, a former partner of Rowen.

Of the five witnesses who swear to Rowen's good character, Andrews, Turner and Davis, are partners and lately clerks of C. F. Rumpp, and are all strongly interested in securing the defeat of complainant, as will shortly be shown.

Freeman beggars criticism.

Fitzgerald (p. 128 to 134) proves by letters and
119 telegram that Freeman, of his own motion, applied to Crouch and Fitzgerald proposing, for a consideration, to prove Rowen a scoundrel, failing in which he turns up to prove his good character.

It is unnecessary to sum up the witness Rowen. More stupid lying is rarely done, and the witness was not worthy the ammunition expended on him.

If he had the slighest pecuniary responsibilty, or felt the weight of a moral obligation, or feared consequences, his evident interest might be urged against him, but knowing his utter contempt for considerations ordinarily influencing men, it is diffi
120 cult to avoid the conclusion that his course in concocting his story, was based on purely business principles.

CHARLES F. RUMPP.

The last case to be considered is based on the testimony of Charles F. Rumpp and his foreman, Philip Metzger, and former book-keeper Andrews.

A suit was pending against Rumpp, and he not only has a strong interest in the success of the defendant here, but has practically thrown himself into this contest and become really a party defendant. 121

It is simply impossible to undertake any complete analysis of the testimony of these witnesses, and especially of Rumpp and Metzger, as they seem to agree on nothing except the fact of the manufacture of rigid bar shawl straps, and the testimony of each is so confused that nothing really tangible can be followed up.

The first regular shawl strap alleged to have been made in Rumpp's place, was made by Metzger, his foreman, who says (page 202, q. 4): About Christmas, 1863, a lady and (page 205, x-q. 29) some lady or gentleman brought needlework there to be worked up. 122

He thinks (q. 4, page 202) she had a European sample with her and yet (q. 31, 32, page 205) he had no guide or shawl strap to make it by; had no instructions (q. 30), and yet (q. 38), made it in accordance with instructions from the store; knew all about them and had seen them before (q. 31), and yet (q. 38) he had not seen them before. 123

He connects the ends of the handle with a *bar* of *needlework* stiffened with *leather*, iron or wood (he cannot tell which), and then thinks it was iron and paste board (q. 5), and again in (x-q. 33, 37 and 42), he describes the bar as iron bent on the ends to form loops covered *with leather*, and the needle work was on the *binding straps alone*, and not on the bar.

He then goes on to testify, that orders for needlework flowed in so that (q. 35) in 1864, 1865 and 1866, he had to employ three or four additional hands on such shawl straps, and yet the first half dozen leather ones, which must have been made by his testimony in 1864 (q. 55 and 56), took the
124 whole factory (q. 81 to make them, and yet (q. 15) in 1866 and afterwards, one man Hiss, made most of the shawl straps as overwork at home.

These straps were made for a year before in the shop (q. 17), making it 1865, and yet in the winter of 1864, they had already manufactured two styles of shawl straps (q. 54–6), and yet again the first half-dozen were made Christmas, 1865 (q. 43).

Exhibit 18 he makes (q. 12) in 1865, and in (q. 68) in 1864.

125 It is useless to follow him through all his stupid blundering, but it may be well to compare him with Rumpp.

Rumpp tells us of many varieties of shawl straps made, that Metzger is entirely silent about.

For instance Rump describes (page 188, q. 96–7, 105, 106, 176), wood, iron, and iron and wood bars. Metzer came near tumbling into the same error (q. 5), but finally settles down on iron, and sticks to it throughout.

126 Rumpp (q. 11, page 179), after speaker of Exhibit 18, says, that after this he adopted certain brass fastenings, and states that Exhibit 19 illustrates the first ones made in quantities, with the exception of the number of straps, while Metzger (page 203, q. 13) says, that the first three strap shawl straps had the knob of Exhibit 18, and no brass fastening, and describes different styles as made in quantitles as early as 1864, putting the brass fastenings in (page 209, q. 71) winter of 1865 or spring of 1866, while Rumpp again (q. 13, page

180) puts on the brass fastening in the last of 1866 or first of 1867, and then (q. 11, p. 180) makes the two strap shawl strap, two years or more before they used the third strap, sending the latter to 1869.

To make it still more complicated, Metzger (q. 127
48-9, page 208) makes the first straps in quantities without brass fastening or ring and knob, riveting or sewing the handle directly on the bar, the handle being extended to form the loops.

Rumpp, not to be outdone, is asked (x-q. 136, page 191), when he made Exhibit 19, and replies, "I couldn't state but it is one of the first ones made with three straps. I wouldn't say it is one of the first ones. When we first made them, we made the handle like Exhibit 18, *same connections and finish*, and we made them so for *some three or four years* before we made them with the handles 128
like Exhibit 19.

Metzger then makes Exhibit 19 as it is, in 1865 or first of 1866 (q. 71, page 209), and Rumpp, in 1868 (q. 28, page 182).

If Rumpp be correct, he made a two-strap shawl strap two years or more, (q. 11, page 179), and a three-strap one, three or four years before Exhibit 19 in 1868. He therefore commenced to manufacture in quantity in 1862 or 1863 and was years before that making single ones (q. 11, page 179).

It is unnecessary to continue this analysis, which 129
only leads to entire confusion.

In the fall of 1866, as testified to by Rumpp, Metzger and Andrews, with more or less positiveness, Exhibit 17 was made, followed, how soon does not appear, by Exhibit Rumpp.

Taking the testimony of all these witnesses, Exhibit 17 was suggested by straps previously made like Exhibit 18, the only purpose of making it, being a desire to increase its strength.

It was made for and used by Turner a salesman of Rumpp's, who having his hands blistered by its use, called for another, and Exhibit Rumpp was made.

Turner, singularly enough, was not put on the
130 stand until the surrebuttal, and then, under objection as to competency, speaks of but one strap, not distinguished, but which really was Exhibit Rumpp.

He says nothing about Exhibit 17 hurting his hands or of its rejection by him, and although he fixes the date in 1866, he gives no reason for fixing that date, and his answers are very guarded. (p. 279).

The other witnesses, in fixing that date, testify as follows:

Rumpp says (q. 71 *et seq.*, page 186), that in that
131 year (1866) he fitted up the cellar for a wholesale department, and that when Turner complained, it was nailed to the door leading thereto, as a handle, while Andrews (q. 13, page 267 and 268), says that the office was moved into the cellar in 1865, and he, *assisted by another clerk*, nailed it to the door he supposed in *January*, 1867 (x-q. 57–58, page 271).

Metzger, however, who (q. 11, page 203), knows *we* nailed it to the door, says he made before removal to the new factory, w*hen* (q. 9, page 203) *he forgot to ask*, but after asking, says (p. 207) was
132 March, 1867, but that the cellar was fitted up same time factory was moved (q. 11, page 203).

Andrews says (x-q. 48, page 270) he knows this handle was put on the door before the office and wholesale department was moved up stairs, because after the removal he had no connection with the basement, although (x-q. 49) he did sometimes go there.

This door had a china knob (q. 61, page 271) before this handle was put upon it.

It is fair to presume that inasmuch as this door was not only the entrance to the wholesale department and office of this large house, but that this handle was an awkward ugly handle to such a door, that it is much more likely that the door was not ornamented with it until after the basement became simply a store room. 133

Andrews thinks he put it on before May 13, 1867, and yet it does not appear that the china knob was missing, nor that it might not just as well and more probably have been put on after that date.

But the confusion in digesting this testimony grows greater when we look at the character of Exhibit 17 and Rumpp.

Both clumsy and awkward, they do not present a bar running under the loops, while it appears by all these witnesses, that long prior thereto, and in fact from the commencement, they had always made them with such a bar. 134

Crouch, the complainant, testifies (p. 17, q. 27, 28), that in 1866 he had made a strap with the bar, stopping at the ends of the handles, and that it was a failure.

And for excellent reasons. The remedy is only partial, and while the handle will not pinch the fingers, the danger of the bundle slipping is as great, if not greater.

To obtain the benefits of this invention, the rigid bar must run out to and support the loops. 135

And yet, by Rumpp or his foreman, after having made and sold large quantities of shawl straps, with practically all the improvements made to this date, there is made, in the fall of 1866, at which time their books record the sale of what they swear to be rigid bar shawl straps, a bungling affair like Exhibit 17, and that, too, by a foreman who had

long previously made not only Exhibit 18, but many other straps much better and fully up to the present state of the art.

But Exhibit 17 proves clumsy and not in accordance with the reputation of Rumpp's establishment
136 (Rumpp, p. 186, q. 65), and after a rebuke Metzger makes Exhibit Rumpp, which also lacks the main feature of the complainant's invention, and the previously made straps turned out for years by Metzger (the extension of the bar under the loops), but which nevertheless meets the approval of Rumpp (q. 84, page 187).

A word now as to *retrogressive invention*. In the eternal fitness of things, it is generally supposed that invention commences with the crude and awkward, and pursues a more or less steady course to the highest perfection.

137 But Rumpp's story overturns all pre-existing notions in this regard, and develops this history.

The first exhibit produced is Exhibit 18, a strap that includes practicaliy the features both in principle and workmanship which go to make the perfect article of to-day.

Next in point of time comes Exhibit 17 and Rumpp, which lack the successful element of the rigid bar, to wit: its extension under the loops; and then, in 1868, Rumpp sees, for the first time, a strap without a bar at all, and likes it so well
138 that on his return from Europe he makes some like it.

Page 187, q. 85 and 92.

In other words, Rumpp commences where the complainant finishes, and finishes where the complainant commenced.

And now to Exhibit Rumpp account-book. This Exhibit purports to be a salesbook kept in Rumpp's establishment, covering his sales from May 7, 1866, to January 30, 1868.

Its admission in evidence is objected to on the ground that it is not a book of original entry, and no proof whatever is made of its correctness, or that a single item particularly mentioned was even sold, save and except Conrad Brothers, December 14, 1867.

139

Nothing appears in any of the entries to indicate that these straps were rigid bar straps, although Rumpp and Andrews both swore they actually were, because they did not *make* straps without such bars until 1868, and Andrews knows they were, from the fact of the prices charged (p. 267, q. 8.)

What the prices indicate he does not explain, but they become significant by comparison later on.

Now did Rumpp not deal in straps without rigid bar at this time? 140

In his testimony (page 187, q. 85, *et seq.*) he says he did not make them *as a selling article* before 1868, but has imported and bought a common article ever since there was a demand for them, and being asked (page 187, q. 88) if he had as early as 1860, *he don't recollect.*

In the face of this testimony, coupled with his answers to the succeeding questions (89 to 93), it will not do for these witnesses to hang their positive assertions, that these sales were rigid bar straps, upon the fact they *made* no other kind. 141

Whether they *made* them or not they cannot swear they did not *deal* in them. And here Andrews seems to be disingenuous, for he says (q. 8 and 9, page 167): "straps without bars," explained by straps without "*leather* or other substance *under the handle* to *connect the two straps*" were not made.

Now, his statement might be absolutely true,

and yet Rumpp have made or dealt in straps with a leather or flexible bar, and the prices so far from indicating that the entries made represented rigid bar straps, indicate the precise contrary.

142 Rumpp says (q. 29, page 182) that Brown, a salesman of Crouch & Fitzgerald, in the winter of 1868 and 1869, came to his place and offered to sell their *patented* shawl straps, much to the amusement of Rumpp's establishment. "Brown made his appearance every now and then with those straps, and at one or two occasions I gave him a *small order*, especially so on a *smaller sized shawl strap* than *I was making myself*."

Taking Rumpp's book, his sales of shawl straps from Novembep 9, 1866, to January 30, 1868, aggregated 40! most of them at $8. 50 per dozen.

143 Leitch (p. 62, *et seq.*), bookkeeper for Crouch & Fitzgerald, shows that in December, 1868, they sold to Rumpp *three dozen* rigid bar straps like Exhibit E, being *larger than Rumpp's* Exhibit's 18 and 19, at $10.00 *per dozen*, 10 *per cent. off*.

Is this man honest? He calls three dozen a small order when it was only four less than his total sales, for 1866, 1867 and one month of 1868, and he bought a smaller size than he was making, when they were really as large if not larger, and he pays fifty cents a dozen more than he sells them for.

144 It would seem that the prices ought not to satisfy Andrews, that these entries in Rumpp's book's were rigid bar shawl straps.

Leitch develops, on cross-examination, that Crouch & Fitzgerald did not make a smaller size of strap until late in 1869.

In October, 1869, Rumpp again bought from Crouch & Fitzgerald six dozen more rigid bar straps, small and large, at an advanced price (Leitch p. 66, and Miller, p. 277), a fact which corroborates the

theory that prior to that time he had made no shawl straps, dealt in them to no appreciable extent and bought what he needed to sell.

To return to Rumpp's testimony, (q. 29, page 182). He says Crouch & Fitzgerald notified him in 1874, by circular and by their salesman (Bremer), 145
to stop manufacturing and importing them, as he was infringing their patent.

He was much put out by the young man's talk, and was inclined to put him out.

Rumpp gave a statement of "*all the quantities manufactured and imported*," a total of 25 gross (page 75, Exhibit I), the salesman charging him thirty cents royalty, and proposed to give a check on the spot, which Bremer foolishly waived. An attempt to contradict Bremer & Crouch, is made, not by Rumpp, but by Andrews & Miller, but their 146
evidence on that point is argumentative and based on general principles.

Rumpp also gave him an order and stated he would import no more, and keep theirs only, in hopes they would, for the sake of getting him as a customer, drop the matter, although in the same breath he said he was *doing very little* in the article anyway.

That order was three hundred dollars, which, considering his last statement, was a fair one. But they did insist on royalty and then he wrote 147
them. Defendants' Exhibit 20, complt's Exhibit R.

His cross-examination (x-q. 149 to 166 inclusive pages 192-193), ought to settle this witness and his party. Briefly stated, he says :

Some time in 1874, prior to the visit of the salesman, he received the warning circular which he destroyed two days before the day he first went on the stand (x-q. 158).

He paid no attention at all to this circular, treated it as a slight matter (q. 150 and 160), for the reason (q. 161) that he never admitted their right to the patent.

To his utter discomfiture he is confronted with
148 complainant's Exhibit N, as follows:

C. F. RUMPP,

Manufacturer and Importer of Fancy Leather Goods.

PHILADELPHIA, Aug. 11, 1874.

CROUCH & FITZGERALD,

Gents.—Since being notified by you of your patent on shawl straps, I have discontinued manufacturing and importing them, but I find I cannot easily do without them, and I would be pleased to
149 know, in order to manufacture and import, what would be your conditions and terms for selling. An early reply will greatly oblige,

YOURS,

C. F. RUMPP,
Per J. E.

In answer to (x-q. 166), he says his young man did not entirely word it as he wanted it, but reading it very slight, let it go.

It will always be a matter of regret to complainant's counsel, that he did not ascertain from
150 Rumpp in what respect he would have corrected it, for it appears to be really a meritorious production viewed from any standpoint.

The complainant has introduced Isidor Bremer, their salesman, and Ed. W. Crouch, who gave a version of the interview with Rumpp, which places in a stronger light, if that were possible, Rumpp's extraordinary behavior (Bremer, pp. 73–75, and Crouch, 100–101).

They waited on Mr. Rumpp, introduced themselves and their errand, and after a little hair-splitting on the term 'rigid,' he wants to know the damage, and learns in reply fifty cents per dozen.

Rumpp promptly launches out into a tirade of abuse of the complainant, the occasion for which 151
was not apparent until he had exhausted himself, when his grievance turned out to be, not that a royalty was demanded, but that he had heard that the complainant had settled with others at thirty-six cents, and this charge of fifty cents, was, of course, resented as a clean imposition.

Perfectly willing to settle at thirty-six cents, Bremer heaped coals of fire on his head, by making the royalty thirty cents,, and then all was peace.

To be sure, Rumpp insinuated that the royalty might be waived, provided he bought a large bill, etc., but finding Bremer inexorable, bought $300 152
of goods, and with the book-keeper, made up a statement of *all* rigid bar shawl straps made and imported by him. (Exhibit I. complt's proofs p 67).

In making it up, it turned out that Rumpp had played a little game by ordering goods abroad, after writing Exhibit "N," but "he thought he would be able to settle for them *when he did the rest.*"

One feature in this statement is worthy of notice.

Rumpp says in his own testimony (page 183, q. 153
29), that he made a statement of *all* he had made and imported, and that was precisely what Bremer asked him to do.

There is no testimony in the case even suggesting that this was to be a partial statement.

Strange to say, then, this statement purports to be one of shawl straps manufactured and imported "from about January, '72, to date."

This is an admission that he then commenced to manufacture, and is fatal to Rumpp.

If anything else were needed, the omission to bring on the stand, the long list of employees in 1866 to 1868, still in his employ; the testimony
154 of Conrad (p. 285) the only customer who was called to verify Exhibit Rumpp Account Book of sales of rigid bar straps (on surrebuttal and incompetent) and who was not even asked to describe the *kind* of shawl strap bought; the failure to produce any of his many customers, to prove their sale, and the evidence of George B. Bains, a very large manufacturer, of Philadelphia, who was a heavy customer and frequent visitor of Rumpp's from 1151 to 1868, who never saw or heard of shawl straps in Rumpp's place, till 1871, when he commenced to buy of him, would amply suffice. (page 42, q. 11 to 20).

155 Rumpp's character for virtue was not attacked collaterally, but his counsel evidently thought it needed bolstering, for at the close of his examination (q. 183), he makes him swear to his own virtue, and at the same time perpetrates a ghastly and cruel joke on his client.

Poor Rumpp details a story of his virtuous behavior where he had infringed, and having ascertained by inquiries of his *commissioner* in London that he was unquestionably liable, he pays up like a man, $18.

156 But what must we think of a man whose virtue is so extreme, that knowing that this patent of the complainant was void, and this attempt to exact royalty from him, a swindle, would offer to pay it.

E. B. BARNUM,
Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM 1880, No. 196.

GEO. CROUCH,
Complainant and Appellant,
vs.
WM. ROEMER,
Defendant and Appellee.

Appeal from the Circuit Court of the United States for the District of New Jersey.

BRIEF FOR APPELLEE.

ARTHUR v. BRIESEN,
Of Counsel for Appellee,
No. 229 Broadway,
NEW YORK CITY.

NEW YORK,
G. LAUTER, STEAM PRINTER, 64, 66 & 68 ANN ST., COR. WILLIAM.
1880.

Supreme Court of the United States.

OCTOBER TERM, 1880.- No. 196.

GEORGE CROUCH,
Complainant and Appellant,
vs.
WM. ROEMER.
Defendant and Appellee.

Appeal from the Circuit Court of the United States, for the District of New Jersey.

ARGUMENT FOR THE APPELLEE.

This suit is brought for alleged infringement by defendant of complainant's Letters Patent, No. 82606, bearing date September 29, 1868, and re-issued March 7, 1871, the re-issue being numbered 4289. The subject matter of the patent is in the re-issue described to be a strap, "*to confine a shawl or similar article in a bundle*" and termed a "*shawl-strap.*" The schedule attached to, and forming part of said re-issued Letters Patent, states, (p .6, record) that before complainant's alleged invention "*straps had been used to confine a shawl or similar article in a bundle, and a leather cross-piece with loops at the ends, had extended from one strap to the other, and above, and attached to this leather cross-piece was a handle. This leather cross-piece or connecting strap is liable to bend and allow the straps to be drawn toward each other by the handle in sustaining the weight; hence the bundle is not kept in a proper shape and this handle is inconvenient to grasp.*"

The schedule next states the complainant's alleged invention to consist "*of a rigid cross-bar beneath the handle, combined with suspending straps that are to be passed around the shawl or bundle, such straps passing through loops at the ends of the handle.*" As to the loops and their position, the specification describes them as follows:

"*C C are loops for the suspending straps D D to pass through. The loops C are shown as made from the leather of the handle B, extending beyond the end of such handle and folded to form the loops. This is much preferable to the loops made at the ends of the leather strap heretofore used below the handle.*"

As to the straps and their position, the specification describes them as follows:

"*The straps D D are to be of any usual character.*"

The first claim of the re-issued letters patent is for, "*The rigid cross-bar A, connecting the ends of the handle and provided with loops C for the straps D substantially as and for the purposes set forth.*"

The shawl-strap which the defendant manufactures, and which is marked COMPLAINANT'S EXHIBIT B, consists of a metallic cross-bar, which has slots at the ends, for the reception of the straps, and which also connects the ends of the handle. It is claimed by the complainant, that these slots are equivalents of the loops, mentioned in the patent, and the defendant has admitted (as appears on page 16 of the record,) the defendant's shawl-strap to be an infringement of the first claim of complainant's re-issued letters patent, PROVIDED SAID PATENT IS VALID.

Applying the first claim of plaintiff's patent to the defendant's shawl-strap, Exhibit B, it will be seen, that the patent seeks to cover in said first claim *"the rigid cross-bar A, connecting the ends of the handle and provided with* SLOTS *for the straps D, substantially as and for the purposes set forth."*

The complainant Crouch, in his affidavit, (page 231 of the record,) which was read at the motion for a Preliminary Injunction in this cause, describes the defendant's shawl-strap in the words following, to wit:

"The same, (Defendant's shawl-strap,) is in all essential respects like that invented by deponent and described in the specification of the re-issued Letters Patent, and embodies all the essential features thereof, to wit: the rigid cross-bar, connecting the ends of the handle and provided with loops or their equivalent for holding the straps. That an attempt has been made to give this strap a colorable difference by STRIPPING IT OF LEATHER, *supporting rigid cross-bar edgewise and* CUTTING THE LOOPS IN THE CROSS-BAR ITSELF, *to receive the straps, but that such evasion introduces no new principle either in its construction or operation, but that the* RESULTS *are precisely the same and obtained by the employment of the same means, the difference being merely in the form of the parts."*

Thus far the complainant's views.

It will be observed that the first claim of plaintiff's re-issued patent is not for the shawl-strap, as a complete article, but for the RIGID CROSS-BAR, connecting the ends of the handle and provided with loops or slots. That is to say, the defendant would be an infringer, (were the patent valid,) if he should make his rigid cross-bar and handle without any straps, as illustrated in defendant's Exhibit 9.

See Wheeler vs. McCormick, 11 Blatch 334.

"A Patent covers only the devices which are claimed."

The defenses set up in the answer are three-fold, to wit:

1. Want of novelty and prior public use.

2. That the patent was surreptitiously and unjustly obtained by the complainant for that which was invented by another, who was using reasonable diligence in perfecting the same.

3. That the patent was illegally issued and re-issued by the Commissioner of Patents, who neglected to declare an interference with another pending application for a patent for the like invention.

The defendant's proofs, both documentary and oral, may be adjusted in fifteen several groups, which are hereinafter consecutively numbered and arranged, and of which the group numbered 11 relates to the

second, that numbered 12 to the third, and all the remainder to the first ground of defense.

Under the first ground of defense, to wit: Want of novelty and prior public use, the defendant proposes to show:

1. That the rigid bar, connecting the ends of the handle, and made with slots in the ends for the reception of straps or cords, is old and was in common and public use in this country on bundle-holders prior to plaintiff's alleged invention.

2. That the rigid bar shawl-strap as illustrated in complainant's patent, was in public use prior to the alleged invention thereof by complainant.

The first question to be met in a defense of want of novelty is: When did the complainant make his invention? This question is answered by the complainant George Crouch, while a witness in his own behalf, in reply to cross-questions 16 and 28 (page 17 of the record), wherein he testifies that his alleged invention was perfected in 1868; that previously he had experimented with a short bar, but finding the same a failure, he finally invented the long bar, which is described in his patent.

Jones vs. Sewall, 6 Fisher, 343.

Section 6 of the Patent Act of 1836, under which plaintiff's patent was granted, prescribes, that any person or persons having invented or discovered "*any new and useful art, machine, manufacture or composition of matter*, NOT KNOWN OR USED BY OTHERS, *before his or their discovery or invention thereof, and not at the time of his application for a Patent, in public use or on sale, with his consent or allowance as the inventor or discoverer*," may obtain a patent therefor.

The defendant's answer denies that the complainant is the original inventor or discoverer of the alleged improvement in shawl-straps, described in said re-issued patent, and offers to prove this through the issue of a patent to Goodrum in the year 1866, of two other patents to W. Watson in 1867 and 1868 respectively, and through a number of witnesses duly named in the answer.

THE DEFENDANT'S EVIDENCE.

Group 1.—Goodrum's Patent of 1866.

The patent granted to T. Goodrum, October 16, 1866, and re-produced on page 139 of the record, is for a "*School Boy's Book Package Binder*," the model thereof, Exhibit No. 3, being made in accordance with this patent. The same shows a bundle-holder having a rigid cross-bar, to which the ends of the handle are connected by means of a wire. Slots or holes are in the ends of the cross-bar, for the admission of the straps or cords. The expert, Mr. Hamilton E. Towle, in answer to question 13, (page 146 of the record), testifies, that he finds the complainant's patent to DESCRIBE the model, Exhibit No. 3, in these words:

"*My invention consists of a rigid cross-bar beneath the handle, combined with suspending straps, that are to be passed around the shawl or bundle, such straps passing through loops at the ends of the handle.*"

The file-wrapper of Goodrum's patent (page 137 of the record) shows that Goodrum applied for his patent May 10, 1866, over two years before the complainant applied for his patent. If the article, made under Goodrum's patent, is covered by the plaintiff's patent, it is clear that its prior publication must defeat the plaintiff's patent. There is no doubt that the article, described in Goodrum's patent, is in every substantial respect like that now made by the defendant. It embodies all the elements, specified in the complainant's affidavit above referred to. It contains the upper cross-bar of a bundle-holder, and, although illustrated with but one single cord, running lengthwise through the slots, is as capable of receiving separate cords or straps transversely. Indeed, the patent (Goodrum's) distinctly states, that: "*it is not necessary that the cord should be a single cord as shown in fig.* 2, *and be led lengthwise along the bottom surface of the bottom binder.*"

The complainant believes that his first claim for a rigid cross-bar connecting the ends of the handle and provided with loops or slots, is not anticipated by Goodrum's patent, because the latter is a book-holder and his a shawl-strap. But he forgets that in his patent he defines a shawl-strap to be a device "*to confine a shawl or similar article in a bundle,*" which is precisely the object of Goodrum's bundle-holder.

In view of the rigid cross-bar, used in Goodrum's bundle-holder, the application of that same or substantially the same cross-bar to Crouch's bundle-holder is but double use. Curtiss, § 55, page 45, commenting on double use, says:

"*There is a very material difference between applying a new contrivance to an old object, and an old contrivance to a new object. The former may be patentable, but the latter* CANNOT *be, when the new object is merely one of a class, possessing a common analogy.*" Both the devices in question being bundle-holders, they certainly belong to one class and possess a common analogy; and therefore the application of Goodrum's rigid bar to the shawl-strap can only be double use. That the Goodrum patent shows a round cord, where Crouch uses a flat strap, cannot change the analogy, particularly if it is considered that in book-holders flat straps were frequently used, as for example on defendant's exhibit No. 7, page 259 of the record, which also shows that the holes in the ends of the cross-bar were cut in accordance with the shape and direction of the straps employed.

The analogy would not be so striking, were it not shown by complainant's own witness, Eustace, (page 35 of the record) that shawl-straps, having stiff leather cross-bars with handle and loops at the ends, were of common use in this country as far back as 1862, and that (see his answer 6) the intent of the bottom cross-piece was to keep the straps in their position on the bundle, and that (see his answer 58, page 39 of the record) this cross-piece was found to answer its purpose in a great measure, and would work remarkably well if the bundle was strapped very tight, and this witness, though the complainant's own, testified about the stiff leather cross-piece in answer to cross-question 59, (page 59 of the record) that he "*could not say that it (said old cross-piece) did not answer the purpose, for it did answer the purpose.*"

In view of these facts, what did the plaintiff invent, even provided there were no other proofs against him? He took the Goodrum stiff bar, and placed the straps through crosswise, as provided in Goodrum's patent, and as shown in the old styles of shawl-straps. The structure and action of Goodrum's cross-bar must suggest to the mind of any ordinary mechanic its adaptation to the same use as the plaintiff's patent; moreover

Goodrum's cross-bar is in terms fully covered by the first claim of plaintiff's patent and therefore necessarily defeats the latter. For plaintiff, as already shown, does not claim his shawl-strap, but does claim the rigid cross-bar, connecting the ends of the handle and provided with loops or slots for the reception of the straps.

Wheeler vs. McCormick, 11 Blatch 334.

Tucker vs. Spalding, 13 Wallace 453.

"*In an action at law, where a patent of prior date is offered in evidence as covering the invention described in the plaintiff's patent, on a charge of infringement, the question of the identity of the two instruments must be left to the jury, if there is so much resemblance as raises the question at all. If what the* PRIOR PATENT PERFORMS, IS ESSENTIALLY THE SAME, AND ITS STRUCTURE AND ACTION SUGGEST TO THE MIND OF AN ORDINARY SKILLFUL MECHANIC ITS ADAPTATION TO THE SAME USE AS THE SECOND PATENT, BY THE SAME MEANS, THIS ADAPTATION IS NOT NEW INVENTION AND IS NOT PATENTABLE."

Group 2—Watson's Patents of 1867 and 1868.

The patent, issued to W. C. Watson, March 17, 1868, and marked defendant's exhibit No. 6 (page 142 of the record) was, as the file-wrapper, (exhibit 24) of said patent shows (page 196 of the record), applied for December 1, 1866, and shows, like its model, exhibit No. 2, a bundle-holder, of which the corrugated cross-bar connects the ends of the handle and has slots at the ends to receive the cords or straps; the same description of cross-bar, handle and slots is shown in Watson's patent of September 24, 1867 (page 141 of the record) and all the remarks made with reference to the bearing of Goodrum's patent on that of the complainant apply with increased force to the Watson patent, as there even the CORRUGATED bar, described in plaintiff's third claim, is clearly shown.

It is clearly proved by the defendant's expert, Mr. H. E. Towle, and more particularly in his answers to questions 17, 18 and 19 (page 147 of the record) that the production of the plaintiff's shawl-strap, in view of the prior public use and knowledge of the three patents hereinabove mentioned, does not involve invention, for the reason that said patents clearly show the rigid cross-bar, connecting the ends of the handle and provided with loops or slots for cords or straps, claimed and as claimed in plaintiff's patent.

Group 3—Witnesses Towle and Webb.

The first witness called by the defendant is Mr. H. E. Towle, an expert in patent causes, who testifies, that and why the first claim of Plaintiff's Patent, Exhibit A, covers the Defendant's shawl-strap, and that and why it covers the defendant's cross-bar and handle, even when the same is made without straps (answers 7 and 8, p. 145); further (in answer 9) that and why the plaintiff's first claim covers the bundle-holders, exhibits 1, 2, 3, which are the devices described in Goodrum's and Watson's patents respectively, and their analogy to the uses to which the plaintiff's patented article can be put.

Sewall vs. Jones, 1 Otto, 171.

"*Whatever would be an infringement of a patent, will defeat it.*"

The witness Towle also shows, aside from the fact that plaintiff's patent does not claim the rigid cross-bar in combination with any straps, that it does not require the exercise of inventive faculty to draw the straps or cords crosswise through the slots of the cross-bars in exhibits 1, 2, 3, 7 and 9, instead of lengthwise.

The plaintiff is thus brought to the necessity of maintaining that if a strap is drawn *lengthwise* through the slots of exhibit 9, said exhibit will *not* infringe his patent; but that it *will* infringe if the strap is drawn crosswise through said slots. This would show that the plaintiff did not invent the cross-bar at all but only the transverse position of the straps, which, however, is not claimed in his patent, and which his own witness, Eustace, and the plaintiff himself, admit to be old in shawl-straps.

The mere adapting the stiff cross-bar and handle from its use in the Goodrum and Watson Patents to its analogous use in the Crouch patent, is double use.

Mr. Towle also testifies as to the sketch of the book-holder (exhibit No. 7, page 259,) that the stiff bar and handle there shown is covered by complainant's patent (answer 17) and in this respect his testimony is to be read in connection with that of the witness Webb (pages 260 and 261 of the record) who testifies that he had used in school in the year 1863, in Baltimore, and had there frequently seen book-holders of the same construction as that sketched by him in exhibit 7, and that the top-bar of said holder was made of hard wood, and therefore, rigid.

The witnesses Towle and Webb are absolutely uncontradicted; their proofs are, therefore, conclusive as to all matters covered by their testimony and relating to the Goodrum and Watson patents, to the exhibits 1, 2, 3, 7 and 9, and to the bearing of these matters on the complainant's patent, and should be conclusive evidence to the court. If a different construction of the patents and devices from that which the expert Towle has given could possibly be given, the plaintiff had the right and opportunity to show this in his rebutting evidence. By leaving him absolutely uncontradicted, the plaintiff admits the reasonings and statements of said witness to be true and correct.

As to the effect of expert testimony the following cases are referred to:

Winans vs. N. Y. & Erie R. R. Co. 21 Howard 88, 100.

Bischoff vs. Wetherel, 9 Wallace 812.

The last case particularly decides that in all cases, where there are two patents, professing to describe an external thing, the identity of signification between the two papers MUST BELONG TO THE PROVINCE OF EVIDENCE and not that of construction.

See also Chancellor Westbury's opinion in Hills vs. Evans, 6 Law Times, New Series 90.

Group 4.—Witnesses Watson & C. N. Miller.

William C. Watson, a witness for the defense, testifies (p. 152) that he is the inventor named in the two patents hereinbefore referred to, and marked exhibits 5 and 6, that he invented the article described in the patent of 1868, exhibit 6, in the year 1865, and the article described in the patent of 1867, exhibit 5, also in 1865 or in 1866; that he made the rigid bar bundle-holders, marked exhibits 10 and 11, in 1865, and the rigid bar shawl-

straps, marked exhibit 12 in the first part of 1867; also exhibits 1 and 2 in 1867, all prior to the complainant's alleged invention; that of the style marked exhibit 12, he might have made 25,000 or more (answer 5) making about half a gross of them in 1867 (answer 28) and that in 1865 or 1866 he had a pattern made (marked exhibit 13) for a stiff bar for a bundle-holder, adapted to receive transverse straps; that he first made castings like exhibit 14 from said pattern, exhibit 13, in 1867. All of these exhibits are bundle-holders, having rigid cross-bars that connect the ends of the handle, and have loops or holes for receiving the straps. The close analogy between book-carriers and shawl-straps is readily apparent from the fact that this witness, commencing with the manufacture of the regular book-straps, soon modified the same into regular shawl-straps like exhibits 12, 13 and 14. The file-wrapper, exhibit 24 (page 197 of the record) corroborates this witness by showing that he applied for his patent, exhibit 6, on December 1, 1866. He is further corroborated by the witness, Charles N. Miller, who was his partner in 1867 and 1868 in the business of making and selling said bundle-holders. He remembers the making of the shawl-straps like exhibit 12 to have taken place before the partnership was started in the spring of 1867, and that they were afterwards sold during the existence of the partnership, that is before May, 1868.

This witness, C. N. Miller, as appears from his letter, exhibit 30 (page 263 of the record) and from the examination of Mr. Roemer (same page) was not friendly to the defendant, and his testimony, as it nevertheless sustains Mr. Watson, is the more valuable on that account.

Against these two witnesses the complainant produces but one witness, *O. Barnett*, (page 66 of the record,) who testifies that he *thinks* that he did not make any castings for Miller and Watson in 1866, but is not positive (see his answer 33) that he was not paid by Watson in 1866. The testimony of this witness is on its face mere guess-work, especially when contrasted with Watson's positive knowledge and with the extracts from his diary, recorded in answer 48 of Watson's testimony (page 196 of the record) which contain entries of money paid by Watson for book-holder castings in December, 1866.

Group 5.—Witnesses Hamilton, Father and Son.

James Hamilton (p. 157) and James Hamilton, Jr., (p. 160) two witnesses called on behalf of the defendant, testify that several years before the breaking out of the war, said James Hamilton, being then owner of a trunk store at No. 2 Cortlandt Street, and subsequently—but yet before the war—at corner of Prince Street and Broadway, New York, made and sold shawl-straps, having rigid bars therein from end to end. It is true, Hamilton did make but few such straps, and admits that the complainant first introduced the rigid bar shawl-strap to the TRADE, to sell again, (answer 25, page 159 of the record) but he nevertheless had the articles, made them, exposed them for sale and sold them, and was ready to supply orders for more. This is competent public knowledge. To establish a defense of want of novelty it is not necessary to show a universal or extensive prior use of the patented article; the statutory requisite being the establishment of prior public use and knowledge.

See Curtis on Patents, section 87, page 80.

"If the thing patented has once been actually and completely invented or discovered before, HOWEVER LIMITED THE USE, *the patent is invalidated.*

The extent of use or the mode in which the inventor treated the article, are immaterial, provided he had completed the structure."

Also Boston Elastic Fabrics Co., vs. East Hampton Rubber Co., 9 Off. Gaz. 745.

Also Curtis on Patents, section 87 *a*, page 91. "*Whether they, (the prior devices,) were in use a greater or less time, is immaterial, except so far, as that fact may tend to show whether they were or were not mere experiments. The prior machine may have been inferior to the subsequent one, and may not have performed its work so well; but so long as it is substantially the same, it anticipates the latter.*"

"*Moreover it is not necessary that a prior machine should have been actually* USED *for the purpose contemplated; but, if it is* CAPABLE *of such use and its adaption to such use be* WITHIN THE KNOWLEDGE OF A MECHANIC *of competent skill, it will be a bar to the validity of the subsequent invention.*"

In Coffin vs. Ogden, 18 Wall 120, but ONE lock had been made and explained to others, but not sold; yet, it was held to anticipate the subsequent patent.

See also Reed vs. Cutter, 1 Story 590, also

Bedford vs. Hunt, 1 Mason 302 (*"The prior knowledge and use by a single person is sufficient. The number is immaterial."*)

Also Pitts vs. Whemple, 2 Fisher's Patent cases 10.

No attempt has been made to contradict the witnesses Hamilton' father and son, on their proof above referred to. The complainant only attempted by the witness Leitch to show, that there is an error in the father's testimony, as to the time of his occupation of the stores above referred to, which error is cleared away by the subsequent testimony, on surrebuttal, of James Hamilton, (page 270 of the record) from which it appears, that the manufacture of rigid bar shawl-straps and their public use by James Hamilton, occurred between the years 1846 and 1850 in Courtland Street, and between 1851 and 1859 or 1860 at corner of Broadway and Prince Street, New York.

Group 6.—Witness Rissler.

DANIEL RISSLER, another witness for the defense, testifies (page 216 of the record) that in the year 1861 he made in his trunk store in Brooklyn, New York, a shawl-strap with rigid bar for a lady who brought him some embroidery to be worked into a shawl-strap. The embroidery not being stiff, he took a wooden bar of proper length and thickness and covered it with the embroidery, cutting recesses near each end for the reception of the two straps. The leather handle was riveted with both ends to said cross-bar. In fact the plaintiff's patented article was thus made in a public shop, and delivered to the purchaser in the year 1861. The application of the stiff bar to the shawl-strap appeared to be a matter of course with this witness, thus showing that it does not require the exercise of inventive genius, but only ordinary mechanical skill to produce the rigid bar in a shawl-strap.

This witness is absolutely uncontradicted, and his evidence is conclusive as to the matters testified to by him.

It is worthy of notice that the witness continues to manufacture rigid bar shawl-straps, and that the plaintiff's partner, Fitzgerald, calling upon him after his name had been mentioned in the defendant's answer, was shown these shawl-straps made by the witness ; and that, instead of objecting to such manufacture, said Fitzgerald told witness, that he, the witness, was "*all right*," (answer 10, page 217.) Why be thus lenient with persons, whose testimony may be injurious? Certainly not from honorable motives.

Group 7.—Witness Rowen.

JOHN ROWEN, a witness for the defendant, testifies (p. 162) that in Sept or October, 1864, he made the rigid bar shawl-strap, "*Exhibit Rowen*," in Philadelphia, copying the construction from others of the same kind, which he saw in the shop in which he was employed. He further testifies that in the year 1864 he made and sold in Philadelphia large quantities of such bundle-straps, having iron or wooden cross-bars, and produced his memorandum book, (Exhibit 15,) which he kept at that time in his own hand, and in which several sales of "*bundle-straps with covered iron brace and with "plain brace*,"—which the witness says, are wooden cross-bars—are recorded from October 20, 1864, to December 22, 1864, as appears on pages 162 and 163 of the record, said entries showing in all the sale of 5½ dozen rigid bar shawl-straps, during the period in question. Witness further testified that in the years 1865, 1868, and ever since, he has continued to make and sell rigid bar shawl-straps and produces an account-book, (Exhibit 16,) kept at that time by himself, and in which the sales of a considerable quantity of rigid bar shawl-straps is entered for the period between April 3, 1865, and September 1, 1865, as appears on page 164 of the record. The witness was subjected to a very rigid and exhaustive cross-examination, which, however, only brought the main facts of his direct testimony into more perfect relief. See for example his answers to cross-questions 164 and seq. (page 172 of the record.) The complainant subsequently sought to rebut him by assailing his character for truth and veracity, calling for this purpose the witnesses Bains, Kennely, Gosnell and Morrison, in all four. In reply to these the defendant produces the following seven witnesses : Andrews, (recalled,) Davis, Freeman, Kite, Bispham, Turner and McCabe, all of whom are residents of Philadelphia, well acquainted with Mr. Rowen, and give him a most excellent character. But even the attack of the complainant through his own four witnesses, did not have the effect desired. Thus Bains, in answer to cross-question 185, page 59 of the record, testifies as follows :

"*Q. From all that you know of John Rowen, would you believe him under oath?*

A. Yes sir, I should."

The plaintiff's witness Kennelly, who was brought to prove that Rowen's character for truth and veracity is bad, and who so testifies, turns out to be an employee of Crouch and Fitzgerald, (answer 20, page 49) a drunkard, (answer 68, page 51,) a shiftless fellow, to judge from the short terms of employment to which he testifies, and above all not acquainted with John Rowen previous to 1869, and therefore incapable of rebutting his testimony.

GOSNELL, the next witness brought to attack Rowen's character, appears to know Rowen only since May, 1875, and thinks badly of his character, because he was disappointed in business matters by Rowen, whose chief fault indeed seems to be his poverty. The animus of Gosnell appears clearly from his answers to cross-questions 22, 23, 24 and 25, (page 71 of record.)

MORRISON, the fourth rebutting witness brought against Rowen, says he would not believe Rowen under oath, unless somebody would corroborate him, and as Rowen is corroborated, (principally by Kite) Morrison's testimony does not affect Rowen's credibility.

Taking the prosecution of this witness into view as a whole, it appears that he is chiefly assailed because of his want of punctuality in paying his debts (see Bain's explanation, page 45 of the record.)

Pierce vs. Newton, 13 Gray 528.

But even if Rowen's character were not in all respects what it should be, that is no reason for casting away his entire testimony, for assuming that the shawl-strap, exhibit Rowen, was not made as stated by him, or for entertaining the monstrous charge that his books, exhibits 15 and 16, were forgeries. In these books he gives the names of the persons to whom he sold his rigid bar shawl-strap, many of whom, such as Reinstein and Hamil, appear to be now living in Philadelphia and within reach of the complainant (see Rowen's answers 99 and 100, 116 to 121, pages 168 and 169 of the record). If Rowen's testimony was false, it is easy to prove it through these parties.

See also Greenleaf on Evid., vol. 3, p. 348.

The seven witnesses, called by the defendant in support of Rowen, have all known him for many years, especially Mr. Davis, who, like Rowen, is a native of Philadelphia. Even Freeman, who, as appears from the testimony of Fitzgerald, is a secret enemy of Rowen and a confederate of the complainant, could not, when forced upon the stand, refuse to say that Rowen's character is such, that he should believe him under oath.

Mr. Turner, Mr. Andrews, Mr. Davis, gentlemen of unimpeachable respectability, and the witnesses Bispham and Kite, all agree in giving the highest character to John Rowen, and the weight of evidence in this regard is entirely in favor of the defendant.

The plaintiff's witness, MORRISON, is further called to prove that Rowen's statement, that he sold his shawl-straps to retail boot and shoe dealers, is untrue. Said Morrison testifies that he was familiar with the retail boot and shoe trade in Philadelphia prior to 1869, and that, to his knowledge, retail boot and shoe dealers did not deal in shawl-straps, (page 72 of the record) though Rowen, in answer 172, (p. 172) testifies that he did see shawl-straps in such places. DANIEL F. BISPHAM, a trunk manufacturer of Philadelphia, sustains Rowen and testifies, in answer 6 (page 278 of the record) that shoe dealers did deal in shawl-straps in former years; to the same effect is the testimony of W. H. Davis, in answer 7, page 286 of the record.

But, inasmuch as by the attack on Rowen's character an attempt has been made to annul his entire evidence, the witness Kite was called and testified, (p. 278) that in 1864 he worked for John Rowen in Philadelphia and made rigid bar shawl-straps for him. This testimony agrees with Rowen's, and especially with his answer to × question 241, page 178 of the record.

The plaintiff objects to Kite's evidence on the ground that he is not named in the answer as having prior knowledge of plaintiff's shawl-strap; but it is in the first place permitted to corroborate the witnesses named in an answer and to prove through *others* the knowledge possessed by the parties named. Thus, if Rowen had died, it would have been competent to prove his knowledge through Kite and others. The patent law requires the defendant to give notice of the names and places of residence of the persons "*alleged to have had the prior knowledge of the thing patented*," and it is perfectly competent under the statute, to prove through A that B had such prior knowledge, or to support the testimony of B.

Elm City Co. vs. Wooster, page 83, Vol. IV, Official Gazette Pat. Off

Roberts vs. Ryer, 6 Fisher, 293.

Le Baw vs. Hawkins, 6 Off. Gaz., 724.

Wise vs. Allis, 9 Wallace, 737.

Where it was held on an objection being made to evidence on the ground that notice of it was not given in the answer, leave to amend the answer was moved for at the hearing, and the amendments were allowed as of the time the answer was filed.

Especially should this evidence be admitted in view of the attempt to impeach Rowen's character for truth and veracity.

Greenleaf on evidence, Vol. I, § 461, page 509.

Hays vs. Sulsor, 1 Fisher, 535.

Treadwell vs. Bladen, 4 Wash., 705.

Wilton vs. The Railroads, 1 Wallace, Jr., 195.

Many vs. Jagger, 1 Blatchf., 376.

"*In answer to such evidence, the other party may cross-examine those witnesses as to their means of knowledge and the grounds of their opinion; or may attack* THEIR *general character* AND BY FRESH EVIDENCE *support the character of his own witness.*"

As far as the testimony of the complainant's witness, Bains, is concerned in which he testifies as to an alleged corrupt transaction of Rowen (Bains' answers 99 and 100, pages 47 and 48 of the record, also answers 197 to 212, pages 60 and 61) the same is fully explained by the witness McCabe, page 282 of the record, in absolute vindication of Mr. Rowen.

Groupe 8.—Witnesses Rumpp, Metzger and Andrews.

Mr. Rumpp, a manufacturer of leather goods in Philadelphia, testifies that the rigid bar shawl-straps, *Exhibit Rumpp*, was made for his salesman, Mr. Turner, before December 1, 1866, to replace the heavier rigid bar shawl-strap, exhibit No. 17, which had been previously made, but condemned because the handle was too broad; that exhibit 17 had been used by Mr. Turner for one trip only, and, that thereupon, the smaller *Exhibit Rumpp* was made. Both these shawl-straps contain rigid bars and are fully covered by complainant's patent, invalidating it, because in public use prior to complainant's invention.

Mr. Rumpp also testifies in his answer No. 11, page 179 of the record, that his book-accounts show that he has manufactured shawl-

straps as far back as 1866, by showing their sale, but "*as all retail transactions are in small books only, I have not any record of the sale of such straps prior to the main book; the retail-books were not preserved. I was years making them in a single way before I made them up in quantities and offered them as a selling article. I made them until last year* (1874). *All those I have made up to September,* 1868, *were with stiff bars, either iron or wood.*"

The witness also identifies the rigid bar shawl-strap, exhibit 18, as one which he had made as a sample to take orders by for single jobs, before he carried them in stock, and produces his account-book, "*Exhibit Rumpp Account Book,*" which shows regular sales of shawl-straps between November 9, 1866, and December 14, 1867. The entries in this book (reproduced on pages 181 and 182 of the record) give the names of the purchasers, the number of straps sold and the prices obtained, and in his answer to cross-question 127 (page 190) the witness gives the address of a large number of the purchasers of the straps, entered in said book. In his attempts to rebut this witness the plaintiff has failed to produce any of the parties named in said book, but the defendant, in his sur-rebuttal, produced the witness Conrad, who identifies a bill for shawl-straps, dated December 14, 1867, as a bill received by his firm from Mr. Rumpp at the time named. The bill, which is in evidence as exhibit No. 35, and reproduced on page 167 of defendant's record, is a perfect copy of the corresponding entry in Rumpp's account-book.

That the shawl-straps, entered in the above account-book, had rigid bars in them is proved by the witness Rumpp in answer to question 22.

"*They were all with stiff bars in styles similar to Exhibits* 18 *and* 19, *only of different leather.*"

Also by the witness Andrews, in whose hand-writing the book is kept, and who testifies as follows (page 267 of the record,:)

Q. 7. *What kind of shawl-straps were those of which the sales are entered by you in this book* "EXHIBIT RUMPP ACCOUNT BOOK"?

A. Straps with the stiff bar, stiffened by a piece of hoop-iron.

Q. 8. *How do you know that?*

A. From the fact of the prices charged and the knowledge that straps, without bars, were not made, until Mr. Rumpp's return from Europe in the fall of 1868.

Mr. Rumpp further identifies the brass fastenings on exhibit 18 as of an earlier age than the style used on exhibit 19, which (answer 12, page 180) was adopted in the latter part of 1866 or beginning of 1867, the older style (answer 13) having been used at least one year before. Also, that he went to Germany May 15, 1868, and had made and sold rigid bar shawl-straps fully two years before that time (answers 16 and 17) and that, while in Germany in 1868, he *first saw* shawl-straps *without* stiff bar, which he liked so well, that, upon his return in September, 1868, he made some like it, which were the first shawl-straps *without* the stiff bar made by him (answer 15.) Mr. Andrews, his former book-keeper, in his answer to Q. 8, above quoted, testifies to the same fact.

It is worthy of mention in this connection, that as early as 1868 or 1869 the complainant's salesman called on Mr. Rumpp, and while offering some shawl-straps for sale, mentioned to this witness that they were patented, whereupon, as Mr. Rumpp testifies in answer 29, "*We all stated to him, that we had been making the same or a similar article, long ago.*" Since then the complainant did not take further notice of Mr. Rumpp,

who continued to make and sell rigid bar shawl-straps until 1874, (see Bain's purchases, Exhibit 33, page 276 of the record.)

But AFTER the answer of this defendant Roemer had been filed, on the 9th day of April, 1875, disclosing the fact that the testimony of Mr. Rumpp was relied upon by this defendant, a suit for infringement was commenced against Mr. Rumpp in Philadelphia, May 20, 1875, (see the notice immediately preceding question 31, page 183 of the record.)

The fact that this suit was not promptly commenced after receipt of Mr. Rumpp's letter of September 24, 1874, (defendant's exhibit No. 20, page 183,) in which Mr. Rumpp stoutly asserts his prior use of the thing patented, and the additional fact, which it seems proper here to state, that after the filing of his answer to said bill of complaint in August, 1875, the plaintiff has failed to file any replication, is ample proof that said action was only commenced for EFFECT IN THIS SUIT, to render the witness in the eye of the Court an interested party, and to thus indirectly affect his testimony,

The correctness of this view of the case is quite apparent, when, with reference to the testimony of the witness Watt, (page 280 of the record), it appears, that the complainant and his counsel were informed by said Watt of his own prior use in 1861 of said invention, in Columbus, Ohio, and nevertheless attempted to use on a motion for a Preliminary Injunction against Rumpp, an affidavit of said Watt, "*Watt affidavit*," page 280, in which the important words, "*or elsewhere*," were erased before Watt would execute said paper. It could never have been the plaintiff's *bona fide* intention to rely in the suit against Rumpp, on a witness who knows as much as Mr. Watt.

As to the testimony of Mr. Andrews (pages 267 of the record, *et seq.*) it will here suffice to state that it fully, completely, and in every respect corroborates the evidence of Mr. Rumpp.

Philip Metzger, foreman of Mr. Rumpp's factory since 1863, testifies, (page 202 of the record) that he had made at said factory shawl-straps with stiff bar, as early as 1864, 1865, 1866; recognizes exhibits "*Rumpp* 17," and that they were made in 1866, and exhibit "18," as made in 1865, "*at least*," (answer 12) or in 1864, answer 68, and remembers that he saw rigid bar shawl-straps when a boy, in Europe. In his cross-examination he testifies, that the first shawl-strap he made at Rumpp's factory was in the Christmas of 1863 to 1864, (answers 28 to 33, page 205) and that he stiffened the cross-bar of the same with hoop-iron. That thereafter in 1864, 1865 and 1866 the business increased so rapidly, especially about Christmas time, that 3 or 4 hands had to be set to work on shawl-straps.

Against the witnesses RUMPP, ANDREWS, and METZGER, the complainant on rebuttal produces four witnesses, to wit: BAINS, LEITCH, BREMER and E. W. CROUCH. The last three are in the employ of plaintiff and under his orders.

Bains, a trunk-maker of Philadelphia, testifies, that he bought shawl-straps from Crouch in 1869, and from one Eustace two or three years previous; that he knows Mr. Rumpp and dealt with him from 1863 to 1868; that he was often at Mr. Rumpp's store during this time and never saw any rigid bar shawl-straps there, but would have seen them had they been there, and that he purchased rigid bar shawl-straps from Mr. Rumpp in 1871.

Now it appears from Leitch's testimony, that Mr. Rumpp bought shawl-straps from Crouch in 1868 and also in 1869, (page 108 of the record) and yet Bains did not see any at Rumpp's place before 1871, because, as he supposes, Rumpp hadn't them (Bains answers 34 and 35,

page 43 of the record). Having certified to Mr. Rumpp's excellent character (in answer 36), the witness finally admits that he did not see Mr. Rumpp's shawl-straps, because his "*attention was not called to them.*" He next admits that the first shawl-straps he ever saw, were those sold him in 1867 by Eustace, and before then he did not know what a shawl-strap was. (Answers 40 and 41.) If he did not know what they were, he could not know what he saw, had he seen some. He next testifies, that he never knew that Mr. Watt had made rigid bar shawl-straps, while Watt testifies, that he had frequent interviews with Bains, and has no doubt that he has spoken to him on that subject. Bains next says, when asked about his dealings with Freeman, and whether he did not tell a different story to said Freeman, that he "*never had any dealings with him until about six months ago.*" (answer 128, page 55 of the record) while Freeman, (page 281 of the record) proves that he had dealings with Bains in 1864, and that he thinks Bains told him, that before he saw any PATENTED shawl-strap, a rigid bar shawl-strap was sent to his (Bain's) shop to repair.

Bains further testifies, that he bought considerable quantities of rigid bar shawl-straps from Mr. Rumpp in 1871, 1872 and 1873, (answers 149 and 150) thus deliberately infringing Mr. Crouch's patent, which he believed to be a valid patent; and that, as Mr. Rumpp has three stores, he went through one into the wholesale store, NEVER INTO THE THIRD, THE RETAIL STORE, WHERE HE DID NOT SEE THE SHAWL-STRAPS.

Now aside from the fact that the negative testimony of this witness does not in any manner overthrow the positive testimony of Messrs. Rumpp, Andrews and Metzger, and that in his cross-examination this witness actually admits the truth of Rumpp's statements, as he does admit the reliability of Rowen's testimony, the boldness must be admired, with which the complainant attempts by the testimony of a deliberate and self-convicted infringer, to overthrow that of other witnesses and to make him a judge of their character.

Greenleaf on evidence, Vol. 3, § 375, page 334.

"*It has been judicially said, that where a witness against the moral character of another is under a necessity of first exculpating himself, no regard ought to be given to his evidence, that the positive testimony of one credible witness to a fact, is entitled to more weight, than that of several others, who testify negatively or at most to collateral circumstances, merely in their character.*"

Powell vs. Swan, 5 Dana 1.

Bain's testimony however is clearly overthrown, not only by his own admissions and short-comings, but also by that of the witnesses Watt and Freeman, already referred to, and further by the witness F. W. Miller, who produces the extract, Exhibit 32, (page 275 of the record) from Mr. Rumpp's ledgers, showing that Bains had no dealings with Rumpp before January, 1867, and that his purchases were largest in 1872, all in complete contradiction to Bains' answers 13, 14, 17, 144, 145 and 146, 161 to 168, wherein he positively alleges, that his dealings with Rumpp preceded 1867, and admits that they were not cash dealings, but on regular account. Mr. F. W. Miller also produces the extract, Exhibit 33 from the books of Mr. Rumpp, from which it appears that Bains purchased as many as 53 dozen, being over four gross of rigid bar shawl-straps, from Mr. Rumpp between 1871 and 1874, thus aggravating the charge of willful infringement against Bains.

Another witness brought by the defendant to surrebut Bains' testimony, is Mr. Charles B. Turner (page 279 of the record), who was salesman for Mr. Rumpp from 1858 to 1875, and who remembers that a stiff bar shawl-strap was made for him in 1866, at Mr. Rumpp's place, from styles that he had seen for sale at Mr. Rumpp's place. This witness fully corroborates Rumpp's evidence and sustains it against Bains. The objection of plaintiff that this witness should not testify, because his name does not appear in the defendant's answer, is not well taken, as Mr. Rumpp's name does appear in the answer, apprising plaintiff of the facts to be proved in the matter.

Wise vs. Allis, 9 Wallace 737.

"*In giving notice under the 15th section of the Patent Act of* 1836, *of the names and places of residence of those by whom he intends to prove a previous use or knowledge of the thing and where the same had been used, the party giving notice is not bound to be so specific as to relieve the other from all inquiry or effort to investigate the facts. If he fairly puts his adversary in the way that he may ascertain all that is necessary to his defense or answer, it is all that can be required, and he is not bound by his notice to impose an unnecessary and embarrassing restriction on his own right of producing proof of what he asserts.*"

See also LaBaw vs. Hawkins, 6 Off. Gaz. 724.

Finally Mr. Andrews, recalled, (page 284 of the record) testifies, that Bains never called at Mr. Rumpp's establishment prior to 1867, and that Bains' son (one of the firm) ridiculed Crouch's patent, and claimed that he would buy from the cheapest maker, and let the other parties fight it out themselves.

The next witness, Leitch, called by plaintiff against Mr. Rumpp, testifies, apparently to contradict Rumpp's answer 29, that the shawl-straps first sold to Rumpp by Crouch were of the ordinary large size, (Rumpp stating that he gave a small order on a smaller sized shawl-strap than he was making himself in 1868 or 1869) but finally in cross-examination, this witness gradually admits, (answers 57 to 63, page 66 of the record) that a bill of "*ladies*" shawl-straps, which is a smaller kind, was sold to Mr. Rumpp in 1869, 1 dozen Leitch thinks, but 3 dozen in fact, as is proved by F. W. Miller at the lower part of Exhibit 33 (page 276 of the record). Even if Mr. Rumpp had been mistaken as to the SIZE of the shawl-straps which he bought from Crouch in 1868 or 1869—nearly 15 years ago—it would not effect his testimony on the facts of issue, yet Leitch proves that Rumpp was not mistaken, even on this immaterial point.

The last two witnesses, BREMER and E. W. CROUCH, who were called against Rumpp, testify entirely as to transactions that have occurred in 1874, and therefore do not touch upon the subject matter here in controversy; yet they contradict each other in nearly all important points, and are finally both contradicted on surrebuttal by the defendant's witnesses, F. W. Miller and Andrews (recalled). The point to be proved by Bremer and Crouch, is that in 1874, Mr. Rumpp admitted the validity of plaintiff's patent and proffered royalty on all rigid bar shawl-straps made by him. Now, even if that were true, it cannot alter the fact that Mr. Rumpp made and sold rigid bar shawl-straps in 1864, 1865, 1866, 1867 and 1868, and it is THAT FACT alone, which is of importance in this case of Crouch vs. ROEMER. What is it to this defendant if all the former makers of the patented article had been frightened or bought into submission to plaintiff's claim? Would he thereby be prevented from proving that never-

theless plaintiff's patent is invalid because of the prior public use by said witness of the patented article?

Can anything, which human corruption or ingenuity may devise, change the logic of facts? And if it is a fact, that the patented article was publicly known prior to 1868 or 1867 by Rumpp or his clerks, can that fact be annulled by any submission on the part of Mr. Rumpp to the claims of the plaintiff? Certainly not. Howsoever such submission, if true, might effect a suit of CROUCH vs. RUMPP, it is clear that it is of no earthly consequence in the suit of Crouch vs. ROEMER.

But it is not true that Mr. Rumpp recognized the patent or offered the royalty to plaintiff's agent. Even the witness Crouch, in answer 24 and 25 (page 102 of the record) admits, that, at the interview in 1874, Mr. Rumpp stated that he had made rigid bar shawl-straps before Mr. Crouch's invention; and both the defendant's witnesses F. W. Miller and Andrews (re-called) are positive, that Mr. Rumpp did not offer nor intend to pay any royalty and that the order, elicited by Bremer for shawl-straps, was not asked nor given on the day testified to by Bremer and Crouch, but on the second day when young Crouch was not present. It will also be important, upon reading Bremer's testimony, to observe, that he was the most dangerous and knowing infringer of Crouch's patent, (answers 211 to 214, page 89) before he entered Crouch's employ; he boasts of having supplied nearly the entire Boston market with the infringing article (answer 219, page 89 of the record) that he made a false statement to Crouch of the number of infringing straps made by him (answers 234 to 243 inclusive, page 90 of the record) and that he took active steps to overthrow the plaintiff's patent before hiring himself out as plaintiff's man of all work (answers 317 to 324, page 97) and that, before joining Crouch, he boasted that he could overthrow the patent (answers 184 to 190, page, 87 of the record) and that he had been a licensee under the Porter patent of 1868 (page 84). He had procured affidavits from Hatch and Easter to show that Crouch's patent in invalid for want of novelty and with these affidavits and with the boast of being able to overthrow the Crouch patent yet on his lips had himself engaged by Crouch to collect *"his royalties."* Bremer's affidavit, attached to the motion-papers against Rumpp is also in absolute contradiction to his testimony in many respects; thus the affidavit asserts, that he is in Crouch's employ since August 24, 1874, while, in his testimony, he says he is there since August 8, 1874 (answers 8, 96 and 117); an important difference in view of his other evidence; so, also, he admits, that the affidavit is false in other important respects (answers 16 to 18, page 76). In fact, a more disreputable witness than Bremer could hardly be produced; still, even if all he said were true, it would not alter the fact of prior use by Rumpp.

That Rumpp, Andrews, Metzger, Turner and F. W. Miller are truthful, that their evidence deserves full credit and that the matters stated by them are FACTS, will be apparent from a perusal of their testimony, as clearly as that Bains, Bremer, Leitch and E. W. Crouch knowingly state the untruth as to nearly all the material points touched upon in their testimony. These four men are certainly all interested in the result of this trial. Bains, because he now deals in thousands of dollars worth of Crouch's shawl-straps, and has not yet settled for his former infringements; Bremer, Leitch and E. W. Crouch, because their fate is determined by that of their employer as much as their story by his inspirations.

Group 9.—Witness Buckley.

This witness testifies(p.211)that from 1852 to 1861 he was in the employ of Knorr, Nece & Co. at Philadelphia, and that, while in such employ, and between September, 1857, and the fall of 1860, he helped making shawl-straps having rigid cross-bars, some of wood, some of iron. He still makes such shawl-straps and advertises them to the public. In exhibits 25 and 26, page 214 of the record, this witness gives rough sketches of the shawl-straps he made before 1860 and of the kind he now makes.

Against him a former employee of the same firm of KNORR, Nece & Co,, by the name of THOMAS W. JONES, is produced by the plaintiff. This man Jones, says he was Buckley's foreman at the time specified (answer 32, page 25 of the record) and then again that he was not his foreman, answers 23, 135 and 136, and that he does not remember of any shawl-straps being made there during the period covred by Buckley's testimony. On cross-examination he admits (answer 25) that Buckley is an honest man, that he, Jones, did not give out work to Buckley (answer 33) but called at his room as often as 150 times a day (answer 94) that he worked on (the third,) another floor of the establishment than Buckley, who was cutter on the second floor (answer 97 and 99) and that his, Jones' duties on the second floor were to get material for use up-stairs, and took him to the store-room—not Buckley's. Now the testimony of this witness is purely negative; he simply does not remember what Buckley does remember.

Greenleaf on Evid. Vol. 3, § 375, page 334.

But he does not remember many things; not even the number of his residence in New York, where he now lodges and where he has lodged every time he was in New York since 1872 (answers 82 and 86). Does not remember that Mr. Hipple gave out the work to Mr. Buckley (answer 40) nor when he worked for other parties (answers 6, 55 and seq.). He does, however, remember that Mr. Mahaffey worked at the time in question in the same room with Mr. Buckley, and when thereupon Mr. Mahaffey was called as a sur-rebutting witness by the defendant, he tes ifies that he himself made shawl-straps and, also, a stiff bar shawl-strap for Knorr, Nece & Co., that Hipple did give out the work and that for Jones, to visit Buckley in the shop, would occupy from four to five minutes each time. When it is remembered that Jones also states in answers 47 and 48 that, before 1869, he did not know what a shawl-strap is, it will readily be seen that he could not know what Buckley was doing when he saw him cutting out straps "*to hitch up the dress*" or other straps (answer 14). EDWARD GAMBLE, another witness, called in support of Buckley by the defendant, testifies that before the war he was in the employ of Knorr & Nece, and that said firm, while he was with them, manufactured shawl-straps (defendant's record, page 274) a fact, which Jones also does not chose to remember (see his answers 15 and 16).

Thus it appears that Buckley, whose character for truth is unassailable, distinctly remembers to have made rigid bar shawl-straps for Knorr and Nece before 1861, describing and sketching the same, that Jones does not even remember the general fact that said firm made any shawl-straps at all during that time, but that Gamble and Mahaffey do clearly recollect that fact, the latter also remembering that rigid bar shawl-straps were there made. The very imperfect negative evidence of a single witness, whose other statements moreover prove his memory to be sadly defective, can certainly not overthrow the very positive evidence of the three witnesses, produced on the same subject by the defendant.

Group 10.—Witnesses Porter, Father and Son, and Marston.

The depositions *de bene esse* of these witnesses were taken by the defendant in Boston, Mass. They testify to the following facts :

That T. W. Porter, an attorney at law and solicitor of patents entered the army of the United States in 1861, and was discharged in the early part of 1865. He was a colonel, commanding a regiment and, at times, a brigade of men, but, in the campaign, found it difficult to have his baggage attended to, and was often compelled to carry his own blankets. The blanket-straps he used were inconvenient, pinching the fingers by drawing the straps together. He reflected upon this inconvenience and found the natural remedy so simple, that he very soon hit upon the idea of a rigid bar. He knows positively that he matured this idea before the opening of Sheridan's campaign in the Shenandoah Valley, which was in September, 1864. During this campaign, which ended in December, 1864, he experimented with and tested the practical utility of the rigid bar. He kept the invention secret from the other soldiers, excepting a few officers, to guard against piracy. His first experiments were with a wooden bar (answers 5 and 7, page 221 of the record). After his discharge in 1865, he had several of the rigid bars made by his son, H. K. Porter, and in 1866, associated himself with C. L. Marston, in relation to another invention. Being without means himself he finally persuaded said Marston to aid him with money to secure a patent on his shawl-strap, and made some of the straps himself, of which he gave one to said Marston, who used it. (T. W. Porter, answer 8, page 222, Marston, answers 9 and 10, 14, 15, page 231, and 23, page 232 ; H. K. Porter, answers 4, 5, 6, 8, page 233 of the record.) His son, suggesting the further idea to stiffen the *handle* of the strap, the two Porters, on the SECOND SEPTEMBER, 1868, applied for a patent for said shawl-strap, their application being duly filed, acted upon and finally granted, as appears from the file-wrapper, exhibit 22, pages 223—225, and from the copy of the patent exhibit 21, pages 216 and 219 of the record.

The patent of Porter illustrates a shawl-strap with stiff cross-bar, uniting the ends of the handle and with loops near the ends for the reception of the straps. The Porter patent claims : "*In combination with bail (i. e. handle) D and straps C C, the rigid bar E, substantially as described and for the purposes specified.*" The specification properly points out the objectionable features of the ordinary flexible cross-piece of leather and describes the position and arrangement of the parts with reference to a very comprehensive drawing, all to the same effect as plaintiff's patent.

The defendant's answer points to the two Porters above named as being possessed of knowledge of prior public use of the plaintiff's invention, and this is clearly proved by the above mentioned testimony, which the complainant has left entirely uncontradicted. It is clearly proved, that they publicly used the plaintiff's invention as early as 1866, even if the use of the invention in the army is not to be regarded as public use.

Group 11.—Patent unjustly and surreptitiously obtained.

But the answer also alleges that the complainant unjustly and surreptitiously obtained his patent for that, which was, in fact, invented by T. W. Porter, who was using reasonable diligence in adapting and perfecting the invention and who applied for a patent for the same Sept. 4, 1868, TWENTY-FIVE DAYS previous to the issue of plaintiff's patent.

This defense is also fully proved.

There is no doubt that Porter invented the rigid bar shawl-strap before Crouch; he perfected his invention, if not in 1864, yet certainly in 1866, and Crouch only in 1868. There is no doubt that Porter used reasonable diligence in adapting and perfecting the invention; for, while in his country's service, he studied over it, described it by letter to Marston (Marston, answer 6, page 230 of the record) and immediately upon his return in 1865 began to make rigid bar shawl-straps, handed one to Marston for public trial and urged Marston to advance the necessary funds for securing a patent; Marston finally consented and a patent was applied for long before Crouch's patent came to issue. If the commissioner of patents had done his duty, he would have declared an interference between the two applications then pending, which would have brought to light the facts above referred to, and prevented the issue of any patent to the complainant Crouch; but this duty he neglected, and thus two patents were issued for the same invention, the one, September 29, 1868, the other December 22, 1868. Yet lack of diligence cannot be charged to Porter; his poverty, incurred while in the Union army, considering his high military rank, does him more honor than a hundred patents; and he certainly lost no time in urging the capitalist Marston to come to the front and help secure the patent.

To cases of the above character the statute clearly applies, and provides a special defense in the act of 1836.

Curtis on patents, §§ 396 and 397, pages 534 and 535.

Phelps vs. Brown, 4 Blatchf. 362.

Reed vs. Cutter, 1 Story's R. 590, 599.

"*He is the first inventor and entitled to a patent for his invention who has first* PERFECTED *and adapted the same to use.*"

Also, Woodcock vs. Parker, 1 Gallis R. 438.

The patentee, Crouch, testifies, as already stated, that HE did not perfect his invention until 1868 (answer 16, page 14 of the record).

The objection of plaintiff's counsel to the deposition of Marston on the ground that Marston's name does not appear in the answer, is not well taken; for the statute does not require the defendant in his answer to name the witnesses, by whom he proposes to prove that the plaintiff's patent was unjustly and surreptitiously obtained for that, which was in fact invented by another, who was using reasonable diligence. Now, Marston is principally called, to prove that Porter did use reasonable diligence in adapting and perfecting the invention, and proves also that in other respects Porter's testimony is true and reliable.

Group 12.—Patent illegally issued.

A further defence, based upon the issue of the Porter patent, is set up in the answer, to the effect that, in view of the application of said Porter, on the 4th day of September, 1868, for a patent for a rigid bar shawl-strap, the commissioner of patents had not lawful right to grant and issue to the complainant a patent, dated September 29, 1868, for the same invention, without first declaring an interference between the two inventions, as prescribed by law, and, that failing to declare such interference, the commissioner issued the plaintiff's patent ILLEGALLY and that said patent is, therefore, void; also that on the same grounds the re-issue was unlawfully granted to the plaintiff.

Section 8 of the patent act of 1836 provides that, "*whenever an application shall be made for a patent, which, in the opinion of the commissioner, would interfere with any other patent, for which an application may be pending, or with any unexpired patent, which shall have been granted,* IT SHALL BE THE DUTY *of the commissioner to give notice thereof to such applicants or patentees, as the case may be; and, if either shall be dissatisfied with the decision of the commissioner on the* QUESTION OF PRIORITY OF RIGHT OR INVENTION *on a hearing thereof, he may appeal from such decision,*" &c., &c.

Now, the file-wrapper, exhibit 22, shows that an interference was not declared, and that, therefore, the commissioner of patents did not perform his prescribed DUTY on the issue of the Crouch patent, issuing the same in disobedience and disregard of the provisions of the statute. That such an issue is, consequently, illegal, is clear and need not be further argued. For, in issuing a patent, the commissioner stands under the law which directs him, when to issue and when to withhold; and if, where the law directs him first to decide the question of priority of right or invention he issues, without raising such question and having a hearing thereof, he does an unlawful thing; and a patent, thus illegally issued, can never be the foundation of a decree in a Court of Justice that stands under the same law.

But even if the neglect to declare an interference between the two original applications, be excused on the ground that at that time the complainant did not claim the rigid bar broadly, but only the CORRUGATED rigid bar, it was clearly the Commissioner's duty to declare such an interference, when afterwards the plaintiff attempted to secure a broader claim by re-issue. The Commissioner of Patents himself in his decision of Carroll vs. Morse, page 453, Vol. 9, Official Gazette Patent Office, (March 7, 1876,) admits it to be his duty to declare an interference between an application for a re-issue and a patent for which the application was filed prior to the grant of the patent to be re-issued, and to this able decision particular attention is here called.

Group 13.—Witnesses Easter and Hatch.

George A. Easter, whose deposition *de bene esse* was taken in Boston, identifies the rigid bar shawl-strap, Exhibit 23, as one made by himself and S. H. Hatch in the summer or fall of 1866; and says that since then it has been used in his family for carrying shawls and bundles. (p. 234)

Seth H. Hatch also testifies that he and Mr. Easter made the rigid bar shawl-strap, Exhibit 23, in the fall of 1866: he also identifies the rigid bar shawl-strap, Exhibit 27, as one made by himself in the fall or winter of 1865, as a Christmas present for his daughter, and says that she, after having it a year or two or more, gave it to her cousin, Carrie Elmes. (Answers 3, 4 and 80, pages 237, 238 and 245 of the record.) Hatch also testifies that in 1862 he was in the army of the United States, and finding his blanket straps unhandy, extemporized a rigid bar shawl-strap, with handle and loops complete, and that in 1864, while still in the army, he made two more rigid bar shawl-straps, using the blade of a rebel sabre as a stiffening for the cross-bars; also that he made several rigid bar shawl-straps between his return from the army and the time Exhibit 23 was made, and sold the same. (Answers 7 to 10, page 238 of the record.)

To rebut this witness, the complainant attempted to prove through Emma F. Dodge and Annie J. Baker that the strap, Exhibit 27, when

given to Carrie Elmes in 1869, was or appeared to be a new strap; but in this he failed, as Miss Dodge states that she does not know whether the strap looked new or not when first she saw it; and Miss Baker does not appear ever to have seen it before giving her testimony; her reply to her uncle's letter, Exhibit Z, page 123 of the record, agrees in full with the testimony of Mr. Hatch. Failing in this attempt, the complainant next endeavored to show through his clerk Leitch, page 65 of the record, that the peculiar looped style of handle on Exhibit 27 was originated by Crouch and Fitzgerald in 1869, thus appearing to insinuate that said Exhibit 27 was copied from Crouch's product and could not have been made before 1869. But this witness Leitch only says, in answer 3, that his EMPLOYERS first put that style of handle in the market in 1869, not, however, that they originated it. Yet, to clear away all doubt, Mrs. Blair, the daughter of Mr. Hatch, was called by the defendant to sur-rebut Leitch's insinuations; she identifies the shawl-strap, Exhibit 27, as the one given her by her father as a Christmas present shortly after he returned from the war, (answer 3, page 299 of the record); that she had it she thinks two or three years before 1869, and that she gave it to her cousin Carrie Elmes in 1869. Mrs. Blair, being now 22 years of age, was but 11 years old when she received the strap as a Christmas present, and it is not to be expected therefore, that she should remember the precise Christmas on which she received her shawl-strap. She proves, however definitely, that this was several years BEFORE 1869, and thereby does away with the insinuations of Leitch, leaving Hatch's testimony ABSOLUTELY uncontradicted. Moreover the testimony of Easter is not at all met by any testimony taken by the complainant.

Group 14.—Witness Meinberg.

The name of Francis Meinberg, whose prior knowledge of the plaintiff's invention did not come to the defendant's notice until August 28, 1875, was thereupon promptly inserted in the answer by amendemnt, as appears on pages 206 and 207, of the record.

He testifies, that in 1865 he made the rigid bar shawl-straps marked Meinberg Exhibits 1 and 3, in his shop in the City of New York, and that the rigid bar shawl-strap marked Meinberg Exhibit 2 was by him made in 1867 in New York, and that Meinberg Exhibit 1 was made for the purpose of being placed in his show case; that Meinberg Exhibit 3 was also kept in the show case, (answers 7 and 8, page 248 of the record,) and that he manufactured considerable quantities of such straps before 1868 for sale. As the witness' recollection of dates is not perfect, it became necessary to fix the time, during which he occupied the premises in Fourth Avenue, New York, where the rigid bar shawl-straps were made and sold by him. This period is definitely fixed by the defendant's Exhibit 29, page 259 of the record, which is the burial certificate of witness' first wife and dated March 1, 1867. It is fully identified by the undertaker L. Hoffmann, (page 265 of the record,) and as Meinberg is quite clear that his first wife helped him to stitch these shawl-straps, (answers 148 to 152, page 258,) and that she died at their residence in 5th Street, which they occupied after a three years' stay in Fourth Avenue, it is clear, that the rigid bar shawl-straps were by him made as early as 1864, and a long time before March 1, 1867. From the testimony of the plaintiff's witness Hays, and defendant's witness Berger, it is also clear that in 1864 Meinberg occupied the premises in Fourth Avenue, New York, where he made and sold said shawl-straps, and where he exposed the show-case

containing said shawl-straps. It even appears that BEFORE 1867, that is either in 1866 or 1865, Meinberg bought a machine, on which to bend the stiff bars like Exhibit 28, which he used in the shawl-straps marked Meinberg Exhibit No. 3, (answers 30 to 36, page 251.)

The testimony of Meinberg is attacked principally by attempts to prove him an untrue and bad character. Four witnesses: Hays, Bartlett, Korn and A. A. Crouch, were called against him.

Hays knows Meinberg since 15 years, deals with him, always found him honest and satisfactory in his dealings, (answer 28, page 21 of the record,) but would not believe him under oath, because he had a loose way of talking about women, (answers 29 to 37.) Hays often called on Meinberg in Fourth Avenue in 1864 and thereabouts, and never saw any shawl-straps there; and would have been likely to see them had they been there, (answer 17,) although before Crouch showed him his patented rigid bar shawl-strap, he did not know what a shawl-strap was, (answers 48 to 53.) He is not positive that Meinberg had a show-case, (answer 54,) but is positive that there were no shawl-straps in it; and that only four things named by him, (answers 55 to 58,) were in the said show-case. He did not see a DOG COLLAR in Meinberg's place, (answer 63,) although Meinberg had a dog-collar in his show-case, (testimony of H. Berger, answer 10, page 289, of the record.) Hays does not recollect of Meinberg's living in 5th Street, (answers 70 and 71,) although his wife died there, *vide* Exhibit 29, but MIGHT have been in his house, if he lived there, (answer 72.) Such an old chatterbox, who moreover is a large dealer in Crouch's goods, indebted to Crouch, and interested in the progress of this suit, is brought to overthrow with his "*don't remember*," and "*did not see any*", talk, the solid evidence of Meinberg, to prove that Meinberg had no shawl-straps in 5th Street, because he, Hays, might have been there, had Meinberg lived there; to prove that Meinberg had no shawl-straps in Fourth Avenue, although, at the time in question, Hays did not even know what a shawl-strap was. To prove Meinberg a disreputable character, although he, Hays, has been dealing with him for many years, still deals with him, and always found Meinberg satisfactory in his dealings; such being the full extent of Hays knowledge of Meinberg's character.

Emma Bartlett, another of plaintiff's witnesses against Meinberg, overreaches the mark by too strong a feeling of hatred and enmity. She says, that she knows Meinberg as a liar and a thief, who robbed her and set her house on fire. If so, why did she not proceed against him for these misdeeds? She further says, that she knows his reputation to be very bad, from what her own men and one Mr. Korn told her. Her own employees may have said so or not, but Mr. Korn, she said, told her that Meinberg was a very bad man, and that he missed loads of things while Meinberg was in his employ, (answers 44 and 45, page 34 of the record.) While Mr. Korn, who is also a witness for complainant, says that he did not say any such thing, (answers 15 & 16, Korn, page 40, of the record) Bartlett further testifies, that she never had an interference with Meinberg on a Patent application, (answer 13, page 32,) but the file-wrapper of the interference between her and Meinberg is in evidence as Exhibit 36, page 292 of the record, and stamps her the liar, which she would like to make of Meinberg, and the unsuccessful thief, which she wants to make of him. The defendant's Exhibits 37, 38, 39 and 40, all relating to the same interference, complete the overthrow of Miss Bartlett's evidence.

HENRY KORN, the former employer of Mr. Meinberg, and 65 years of age, is next called to speak bad of Meinberg, and says, (answer 4, page 40,) that his character is rather bad than good; but that he cannot prove

him any misdeed; Meinberg always served him honestly and faithfully, (answer 10,) and the witness formed his ideas AGAINST Meinberg only from hearsay, (answer 11,) and Mr. Fitzgerald, CROUCH'S PARTNER, is the ONLY person whose name he does remember who spoke bad of Meinberg, (answer 20 and 21, page 40 record.) This may be called evidence manufactured by Fitzgerald! and will have weight as such, but no further.

Finally comes young Crouch, A. A. Crouch, page 106 record, and testifies in absolute support of Meinberg's answer 23, page 250, about an interview he had with Meinberg in August, 1875, which is otherwise immaterial to this action.

In support of Meinberg's character, the witnesses BERGER, HAMM, HANLON and PERES were called by the defendant.—Berger knows Meinberg since 15 or 16 years, and was his next door neighbor; testified that Meinberg was treasurer of the Odd Fellow Lodge to which he belonged, that he performed his duties as such well and regular, and that if his reputation were not good, he would not have been entrusted with the office of treasurer; witness knows Meinberg's character to be good. He also remembers the show-case of Meinberg, and that there were straps in it but does not know their technical name; and that while Meinberg was in Fourth Avenue, the witness, who is an artist, frequently made designs at Meinberg's request, for embroidery to be used on straps.

HAMM testifies to Meinberg's true and good character, whom he knows 15 years.

PERLS knows Meinberg since 1869, and that Meinberg is Vice-President of a society, whose object is sick relief and insurance, and which has fifteen thousand members; knows him to be a man of very honest and good standing, otherwise he would not be an officer of the society.

HANLON knows Meinberg since 16 years, and testifies to his truthful and good character.

It is believed, that the weight of evidence is clearly in favor of the defendant as to Meinberg's testimony. The villifying attempts of Hays and Bartlett, self-convicted as they stand before the court, can certainly not influence the court, especially when those persons, who are likely to know Meinberg's social life and grade of morality, speak of him in the highest terms.

Group 15.—The state of the Art.

Although this subject was not touched in the defense - excepting incidentally in Easter's examination, inter. 8,— the plaintiff saw fit, through the shawl-strap maker Eustace, to show, that, as far as Eustace knows, the complainant is the first to make a rigid bar shawl-strap, excepting Eustace himself, who made cross-bars of stiff leather that answered the same purpose (page 35 on the record). Now, it is eminently proper, that a patentee, when he wishes to strengthen his evidence either in the opening of his case or to rebut evidence offered by the defendant, should bring testimony to show the state of the art. But he CAN only call persons who were in the way of hearing of the invention, if it had existed before to testify that they have not heard of it.

Curtis on pat. § 473, page 625.

It will not do to pick, from a host who did have prior knowledge of the invention, one, who did not know as much. To rebut Rumpp, the plaintiff should have produced the purchasers of rigid bar shawl-straps,

recorded in his account-book; to rebut Rowen he could have found Reinstein and Hamil and other purchasers of rigid bar shawl-straps; if THEY could testify that the entries opposite their names were false, the state of the art would by so much be proved in accordance with the plaintiff's theory. The plaintiff must (as Curtis shows § 473) proceed by exhausting the AFFIRMATIVE instances of former use, by calling those persons who might have known of it if it had existed before. In this cause, however, the plaintiff preferred to exhaust the NEGATIVE by producing one single person who did not hear of the invention, and it is chiefly to show the court what the plaintiff might have proved, had he called the right parties, that the defendant, on his sur-rebuttal called the witnesses Segee, Conrad, Kite, Watt, Mahaffey, Turner and Blair, who were all capable of testifying on the state of the art, but who were evidently deemed not convenient witnesses by the plaintiff, as they knew more than he wanted them to know. Mr. Segee, for example, shows that he knows rigid bar shawl-straps to have been in public use in New York as early as 1852, and, also, that he had imparted this information to Mr. Fitzgerald. Mr. Watt had done the same, but yet neither he nor Segee were called by the plaintiff to prove the state of the art, and therefore the defendant has undertaken to complete the picture drawn by Mr. Eustace, by supplying his negative with a positive proof.

"*The testimony of witnesses, of whose names no notice was given to the complainant, is admissible to show the state of the art.*" *La Baw vs. Hawkins*, 6 *Official Gazette Patent Office* 724.

Vance vs. Campbell 1 Black 427.

Much more might be said on the voluminous testimony taken in this cause; about the corrupt bearing of the complainant in the entire transaction in view of his knowledge of Segee's public manufacture, his evidently corrupt bargain with Bremer, his corrupt application and manipulation of the Watt affidavit, his manifold attempts to misconstrue facts as in the cases of Hamilton and Hatch, his method of attaking the character of the defendant's witnesses, and of actually manufacturing evidence against them, as in the case of Korn, and no doubt also of Hays and Bains. But the defendant is satisfied with the completeness of his proofs, and there leaves his case. On fifteen several groups of evidence the defense is based, each of which alone must show the complainant's patent to be entirely invalid and fully anticipated.

And a decree, dismissing the appeal with costs and interest is consequently prayed for.

Respectfully submitted,

A. v. BRIESEN,

Counsel, for appellee.